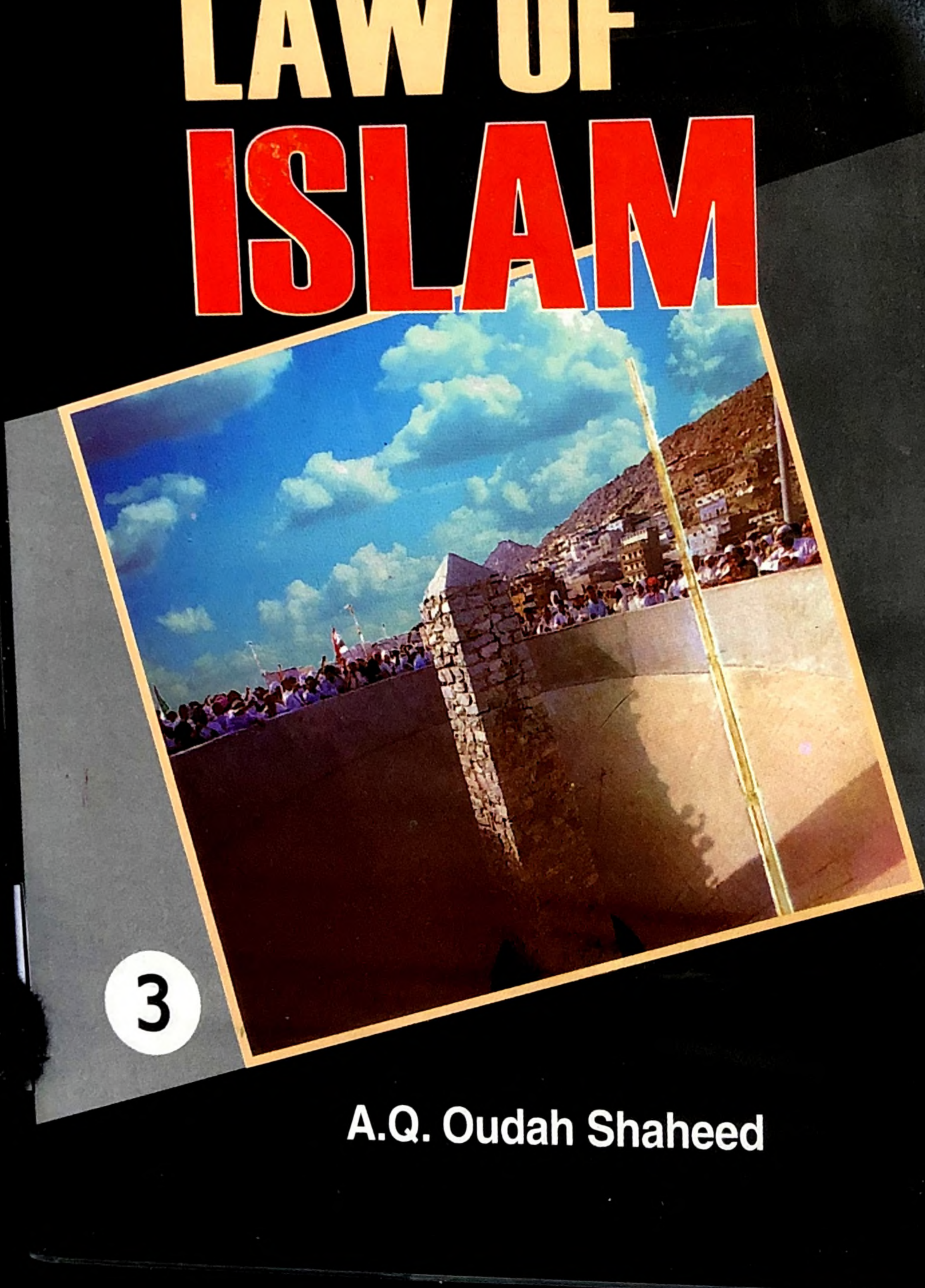
CRIMINAL LAW OF ISLAM



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A.Q. Oudah Shaheed

This book is comprehensive study of the Islamic Criminal Law of Islam and the Modern Law. It essentially consists in an enquiry into the respective principles and theories underlying the Islamic Laws and other Laws and aims at identifying the points of difference and similarity between them.

CRIMINAL LAW OF ISLAM

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CHAPTER VII

THE GENERAL NATURE AND PRINCIPLES OF PUNISHMENTS

Numbers 436 and 437 have been omitted due to re-arrangement of numbers. No clause has been missed.

438. Punishment and Purpose of Punishment

Punishment is the requital for the disobedience of the law-giver (Allah and the Prophet S.A.W.) laid down in the collective interest. The object of prescribing punishment for the violation of the Law Givers' edict is to reform the society, deliver the individuals from evils, save them from ignorance, lead them out of a life of aberration, prevent them from committing sins, and induce them to obey Allah and His messenger. Allah did not send His prophets and messengers to establish their ascendancy over the people and become their rulers. They were rather entrusted with the duty of conveying and disseminating the divine message and serve as mercy personified for mankind. Says Allah:

"Thou art not at all a warder over them." (88:22)

"Thou (O Muhammad) hast not been sent as a compiler over them." (50:45)

"We sent thee not save as a mercy for the peoples." (21:107)

In short, Allah revealed His Shariah and sent down His Messenger in order to guide mankind and preach them the revealed truth and wisdom. Besides, Allah has prescribed punishments for the infringement of His commands as well as those of His messenger, so that people may do things benefiting them and shun those which are harmful. Hence the purpose of punishment

to protect the individuals, the community and the social system as a whole. Allah has issued His injunctions for the sake of our welfare only, for if the whole mankind inhabiting the globe disobey Him, He has nothing to lose; nor has He anything to gain if the whole mankind obeys Him.

439. The Basic Principles of Punishment

Inasmuch as punishment aims at reformation, safeguard of collective security and furtherance of social welfare, it must, of necessity, be based on such principles as serve the purpose thereof. The principles by which this objective can be achieved are as under:

1. Punishment is to be such as makes the people desist from the commitment of crimes, serves as a chastisement of the offender and a warning to others. The jurists, therefore, have this to say about punishments:

"The *Shariat* punishments actually constitute a curb on the commitment of offence and make the offender desist from committing them. In other words, once acquainted with the legal position of punishment, one would refrain from committing an offence and from committing the same offence again one may have been guilty of before."[1]

2. In the delimitation of punishment collective requirement and public interest has been taken into account. Thus if the public interest so demands, punishment will be awarded with increased severity, but if reduction in punishment is in the public interest, it will accordingly be diminished. Hence punishment should neither be more or less than collective requirement. It should be commensurate with the demands of public interest.[2]

3. Should the collective interest demands that the offender be exterminated or imprisoned in order to ensure the community's security against his evil deeds, it will be imperative to award him capital punishment, a life-imprisonment till his death or till he dies, repents or is reformed.[3] It will, therefore,

1. *Sharh Fath-ul-Qadeer,* Vol.4, P. 112.
2. *Al Ahkamus Sultania,* P. 206; *Sharh Fath-ul-Qadeer,* Vol. 4, P.212, 215; *Tabserat-ul-Hukkam,* Vol.2, P.206; *'Al Iqna,* Vol.4, P.268.
3. *Al Iqna,* Vol. 4, PP 271-272; *Hashia ibn Aabideen,* Vol.5, P.480 and Vol.3, PP.259-60: *Ikhtiarat ibn Taimiyah,* P.178.

be wrong to adopt some particular forms of punishment to the exclusion of others.[1]

4. Revenge is not the purpose of an offender's chastisement. The purpose is to correct or reform him. And all kinds of punishment, according to the jurists, "are given with a view to reformation and as a warning and chastisement and they vary with the nature of crimes."[2]

Punishments have been enjoined by Allah out of mercy and benevolence. It follows that the person awarding punishment to an offender ought to be merciful and benevolent in the same way as a father is to his son in chastising him or a physician is in the treatment of his patient. Besides, chastisement varies with the respective status of the offenders. Thus in passing sentences respectable or well-to-do people are not to be treated at par with the vulgar or the commoners. The Holy Prophet enjoins: 'Condone the mistakes of people enjoying social position.' Again, chastisement is designed to prevent the people from committing crimes. But the people are temperamentally different. There are some people for whom a rebuke will be enough, while there are others who need a slap to be set right and others who cannot be corrected without getting a nice hiding or being imprisoned .[3]

440. The Concept of Punishment in Islamic Shariah

The principles on which punishment is based in is *Shariah* stem from two fundamental rules. The one which is in conflict with crime in total disregard of the offender's person, and the other taking into account the offender while being at odds with the crime at the same time. The first set of principles are primarily concerned with the negation of crime to the exclusion of the offender and is designed to safeguard the society against incidence of crime while the second set relates to the personality of the offender and aim at his correction.

Doubtless the two sets of principles seem to contradict each other, for if the society is to be protected against crime, the

1. Ibid.
2. *Al Ahkamus Sultania* PP. 205. 206
3. *Sharh Fath-ul-Qadeer,* Vol. 4, P.212.

person of the criminal will have to be overlooked, whereas if the offender is to be paid due regard to social aspect of the matter will have to be ignored.

But the Islamic *Shariah* has not only founded its punitive system on these seemingly contradictory principles but has also taken care to remove the apparent discrepancy between them in order to safeguard the community against crime in all circumstances. Nor is this all. In most cases it makes allowance for the offender's personality as well. For the *Shariah* has adopted the principles of collective security in an absolute sense and has kept it in view in laying down all the punishments. Accordingly every punishment is a sufficient chastisement of the offender in proportion as it prevents him from committing the crime again and serves as a warning to others so that they may refrain from committing it. But if the chastisement of the criminal does not serve the purpose of making the society immune from his baneful influence or the considerations of collective security demand that he should be eliminated, he shall, of necessity, be exterminated or imprisoned for life. At any rate, the *Shariah* disregards the offender's personality in the case of crimes that undermine social life, inasmuch as it is absolutely essential to do for the protection of the community. However, crimes of this sort are naturally limited. In the case of the other crimes, the *Shariah* pays due regard to the person of the criminal. It enjoins upon the court or the person in authority that the criminal's personality, moral character and circumstances are to be necessarily kept in view while passing a sentence upon him.

CLASSIFICATION OF CRIMES

The result of blending the two divergent sets of principles is that every principle requires a separate sphere of its applicability without being extensible to any extraneous sphere and the distinguishing marks of every sphere is identified for the right application of every principle. Hence the *Shariah* divides crimes into two categories:

First Category: Crimes with an impact on social life.

Under this category fall all those crimes that badly affect

the society. These are further sub-divided into two kinds, whereof each is subject to a distinct injunction.

First Kind

Crimes affecting social existence comprise offences liable to *hudood* (punishments ordained by Allah). They are Seven in number:

(1) Adultery or Fornication
(2) Imputation of Adultery
(3) Larceny
(4) Drinking of Wine
(5) Shedding of Blood
(6) Apostasy and
(7) Rebellion.

Punishments for the seven foregoing crimes have been unequivocally prescribed by the *Shariah* and the court is not empowered to make any changes in them. Hence whoever is guilty of any one of these crimes shall be punished with the corresponding *'had'* regardless of the victim's (aggrieved party's) opinion and the personality of the offender. The judge or the person in authority shall have no power to forgive the crime or remit the punishment thereof.

In other words, as to *hudood* offences the *Shariah* focuses its attention on safeguarding the society against crime in total disregard of the offender's person. Accordingly the *Shariah* is strict about these punishments which it prescribes rigidly and allows no powers to the person in authority or the court in respect thereof.

The reason for laying down inexorable punishments for such offences is that they are immensely grave and dangerous and any laxity in dealing with them would lead to decadence, disorder and discontent in the society. Any social set-up falling a prey to these evils will disintegrate and be disgraced. The object of the *Shariah* by adopting a rigorous attitude towards the above offences is to ensure that the moral fabric of the society, the social order and peace and collective security is not jeopardized. In other words, prescribing harsh punishment for the *hudood*

offences public good has been kept above the individual interest, and this is not some thing surprising. Just the contrary would have been queer indeed.

Second Kind

The other kind of crimes affecting social life consists of offences involving *qisas* (retaliation) and *diyat* (blood money or compensatory *mulct).* Such offences constitute cases of homicide and infliction of wound whether wilful or unintentional. They are as under:

(1) Intentional or felonious homicide.
(2) Suspected wilful homicide.
(3) Unintentional homicide.
(4) Wounding intentionally.
(5) Wounding unintentionally.

The *Shariah* prescribes two punishments for these offences: *Qisas* or retaliation and *diyat* or blood money. If committed intentionally, the punishment will be *Qisas* and *diyat* and if committed unintentionally, the punishment will be only *diyat.* The person in authority or the court does not have the power to reduce or increase and make any other change in the punishment laid down. Thus whoever is guilty of any offence as specified above will be awarded the prescribed punishment regardless of the offender's personality and circumstances.

Although the power to forgive is not conferred by the *Shariah* on the person in authority, yet the victim or his lawful heir/ guardian has been authorized to forgive. Hence if the latter pardons a wilful offence, qisas stands annulled and *diyat* replaces it provided that it is pardoned in lieu of *diyat* But if such an offence is forgiven without any compensation then *diyat,* too, will become void. The result of the nullification of *qisas* for a wilful offence and of *diyat for* an unintentional one, will be that the offender may be awarded penal punishment taking into account the circumstances of the victim.

From what has been stated above we learn that the *Shariah* focuses its attention on the safeguard of the community to the exclusion of the crime and the criminal, giving no importance to the person of the criminal act except that the victim or his lawful

guardian is competent to pardon him. In this category of crimes, the *Shariah* authorizes the victim or his lawful guardian to forgive the offender because although the crime affects the community but it has greater impact on the victim. In fact it affects the community only through the victim. Hence if the victim or his lawful guardian forgives the offender the legal requirement to disregard the latter's personality and to inflict punishment on him ceases to have any validity, for the danger posed by the offence is no longer there and the offence is rendered harm-less to the community. As a matter of fact the victim and his lawful guardian forgive the offender when they either mean to condone him or to gain something material in the form of blood money or compensation and the *Shariah* gives their right to do so, the reason being that condemnation means doing away with the feuds and putting an end to animosities. Preference of material gains to corporal punishment also aims at condemnation and assuaging the virulence of animosity. There should be no doubt whatsoever that the victim or his lawful guardian should have the benefit of offence as far as possible inasmuch as it is he who bears the brunt of the offence.

Second Category: Other Crimes

This category comprises offences that do not fall under the first category or rather consist of crimes whereto the *Shariah* applies unprescribed penalties. Hence they include all those offences for which *'tazeers'*, or the penal punishments, are awarded. These may be further subdivided into the following offences:

(a) Any crime which does not come under the category of *hudood* offences as well as those involving retaliation *(qisas)* and blood price *(diyat).*

(b) *Hudood* offences for which sentence is not passed i.e. *hudood* offences not completely committed as well as those in respect whereof the *had* stands invalidated.

c) The *qisas* and *diyat* offences for which no sentence is passed and which are not liable to *qisas* or payment of blood price.

The crimes classified under second category are not as dangerous as those falling under the first category and, therefore,

the injunction relating to them is different from the one applicable to the latter. In the case of first category, it is binding upon the court to pass prescribed sentences and it is not empowered to change, increase or decrease the punishment. As regards the second category, on the contrary, powers have been conferred on the court to choose any penalty out of the collection of punishments as it may deem fit. It also has the power to assess the quantum of punishment as well as the circumstances of the offender and the causes of offence. If the circumstances of the offender and the causes of offence do not warrant any curtailment in punishment, the court should award him the punishment he deserves. But in case if the circumstances of the offender require remitted punishment, he is to be awarded lighter punishment in keeping with his personality, character and behaviour. In case if the circumstances in which a crime is committed demand rigorous punishment, but the circumstances of the offender require remission, he is to be awarded moderate punishment which should neither be too harsh nor too light.

In this category the *Shariah* applies the principles constituting the doctrine of punishment keeping in view both the individual and the collective aspects thereof. Thus if the circumstances of the offender do not warrant any curtailment of punishment, the Shariah takes into consideration the safeguard of the community in the choice of the quantum and the kind of punishment in total disregard of any other aspect. But if the circumstances of the offender demand remitted punishment, they will be kept in view in determining of, the punishment to be awarded. However, should the circumstances of the offence require rigorous punishment while those of the offender warrant leniency, then both collective security and the personality of the offender will be given due consideration in determining the quantity and quality of punishment.

In this category of crimes the position of the victim cannot be relied upon and because of his pardoning the offender, punishment will not become void. But pardoning of the offender by him does provide a judicial criterion of mitigating punishment. Thus if the victim is reconciled with the offender or forgives him, the court will treat the reconciliation or forgiving as a mitigating circumstances in favour of the offender.

The penal punishment, however, does not stand invalidated as the result of the pardoning of the offender by the victim because every punishment involves two rights. The one belongs to the victim and the other to the community. If the victim foregoes his right, the community's right to punish him is not prejudiced whereas so is not the case with qisas and *diyat* punishments. These constitute the exclusive right of the victim and his lawful guardian. Hence if they forgive the offender the punishment in such a case would become void and be replaced by *'tazeer'* or penal punishment, for *tazeer* is the right of the community. That is why the result of pardoning the *tazeer* punishments does not manifest itself in the same way as it does in the case of *qisas* and *diyat,* the reason being that *tazeer* involves the right of both the victim and the community. If the victim's right becomes void the right of the community remains intact. *qisas* and *diyat* on the contrary, are the exclusive right of the victim. If he foregoes them, both the punishments will stand invalidated.

The Reason for Treating the First Category of Crimes as Having Bearing on the Society.

It has already been stated that the *Shariah* treats with harshness crimes falling under the first category and focuses its attention on the protection of the community against such crimes in total disregard of the offender's personality except that in the case of *qisas* and *diyat* offences, the victim may forgive the offender. It has also been mentioned that both the kinds of offences placed in the first catetory badly affect the community. That is why the *Shariah* fixes its glance in their case on the safeguard of the community against the possible harm caused by the crime. Now the question arises as to how these crimes affect the community.

All the social structures of the world have been raised on the following foundations and will always stand upon them:

(1) The formation of family.
(2) The basis of individual proprietory right.
(3) Social order and
(4) System of government.

The existence of man and woman, their capacity to procreate, the dependence of their offspring's growth on their care and upbringing till they grow up, are matters that naturally require a man to reserve for himself a particular woman and attribute to himself the children borne by her. This mode of a human couple's living together calls for the formation of family and the very constitution of family is the basis of every social order; for a community is another name for a collection of individuals. Every social pattern of the world including the socialist pattern is grounded in the institution of family. In other words, family is the basic unit of any society.

The basic necessity of human life consists of food, clothing, shelter and the complements needed to obtain these things. The basic human necessity as such requires that man should secure and own things that satisfy his want and when the situation is ripe for the emergence of family system he should preserve all those essential things for his family. This natural requirement of human existence has brought forth the institution of individual or private ownership just as the demand of human nature and basic needs have given rise to family system. These two institutions family and private ownership - are everlasting. Although socialism and communism champion collective ownership of property and prefer it to individual ownership, yet even the most ardent advocates of the socialist and communist systems do not favour total abolition of the above institutions; for individual ownership is the fundamental demand of human nature. Every human being must, of necessity, own the things that satisfy his basic needs i.e., food, clothing and shelter. If the individual has no exclusive right to these things, human life will be impossible.

Family system and the institution of private ownership require that the individual's rights to life, freedom, proprietorship and security of the family is to be safeguarded. But the individual is weak. His wants are countless and resources extremely limited. He is dependent on the cooperation of others. This state of affairs gives rise to society.

The formation of a society calls for a social order. That determines the principles of social setup as well as the rights and

duties of individuals. Every society has a distinct collective system of its own. For example, the social system of Islam is based on Islamic principles, while the system of non-Islamic societies is grounded in the principles of communism, socialism and capitalism.

Again, the existence of society needs a system of government wide awake to its affairs, capable of solving its problems, pursuing a sound policy to promote common good and a system that safeguards the social set-up and maintains internal peace and external security. However, forms of government vary with countries. Some countries have democratic system, while others have monarchy or dictatorship. Whatever the case, a system of government is indispensable to the subsistence of a society.

There, then, are the four foundations on which social structure rests. If any one of them is affected the whole social edifice is shaken and the pillars on which it stands falls to the ground.

The *Shariah,* therefore, has spared no efforts to provide for the safeguards of these foundations on which the survival of the society is entirely dependent and any lapse in this regard would result in the collapse of the social system.

The *Shariah* has restricted dangerous transgression having bearing on the above foundations of social system to the following offences:

Hudood offences and crimes involving *qisas* and *diyat, i.e. adults*

Hudood offences and crimes involving *qisas* and *diyat,* i.e. adultery, calumniation, drinking wine, larceny, shedding of blood, apostasy, rebellion, homicide and intentional as well as unintentional infliction of wound.

Adultery constitutes an outrage against family system. If it is permitted and no punishment is provided for it, everyone will be free to have relation with any woman and to impute to himself or deny the parentage of any offspring at will. Such a state of affairs will finally result in the domination of the weak by the strong; descents will never be traceable and parents and children both will be put to shame. This would ultimately lead to the disintegration of the family system.

Larceny or theft cuts at the very roots of the institution of

private ownership. If no punishment is awarded for it, every man can freely share the food, wine, shelter and clothing of another man, so much so that the strong will ultimately be dominant and deprivation from the basic needs will be the lot of the weak. To justify theft would mean negation of private ownership and the individuals would be helpless in the acquisition of the basic necessities of life. Thus an important pillar of social set-up would be founded and the society will be reduced to nought.

Apostasy is a violation of the social order, for Islam alone provides the warp and woof of every Islamic social set-up. The very meaning of apostasy is negation of Islam. It infringes the basic principles of Islam and calls into question their validity. No social system can subsist when its own members begin to doubt its legitimacy; for such a sceptical attitude would finally result in the dissolution of the whole system.

Rebellion is an outrage against the political and administrative setup of a country. It means disobedience of the rulers and revolt against an established government, or else, its purpose is to overthrow the government. If such a crime is not contained unrest will spread in the land and the society will fall a prey to strifes and civil war. It will split up into warring groups giving rise to bloodshed and wholesale destruction. Breach of peace and chaos will finally wreck the social set-up tooth and nail.

The offences of homicide and infliction of wound are transgression against the builders of society on the one hand and against the government on the other. Now the social system is responsible for life and property of individuals, while the government is under the obligation to safeguard the social order as well as maintain peace and tranquillity in the land. Hence any laxity in the prevention of such crimes would result in the domination of the strong over the weak. The individuals would abandon fruitful activities and indulge in bloodshed and plunder. The law-abiding citizens would be occupied in self-protection. Such a state of affairs would lead to the disintegration of society and anarchy. The *Shariah* does not want things to come to such a pass. Hence it prescribes *qisas* if the crime is committed wilfully and *diyat* if committed unintentionally. These are deterrent

punishments designed to safeguard those who build the society and provide peaceful atmosphere for the citizens.

Qazaf or calumniation constitutes an outrage against the family system. In *Shariah 'qazaf'* means imputation of adultery. It is tantamount to leveling a false charge against the honour of someone. Such a charge is the expression of doubt about the integrity of family system. It is to impute parentage of a child borne by the wife of a man to some male belonging to another family. If the integrity of the family system is called into question the fabric of social life will be enfeebled inasmuch as family constitutes the basic unit of social system.

As the result of drinking wine, a man's consciousness is benumbed. In such a state of mind the offender may commit theft, *qazaf* and adultery. Besides an intoxicated person may lose his belongings. Also, drinking is injurious to health and causes progenitive debility. *As* drinking of wine is an outrage against the society in every sense of the word and undermines the very foundations of the social edifice, Islam imposes total prohibition on it.

Bloodshed is one of the most dangerous offences. If it is committed for the purpose of stealing, it amounts to violation of the right of private ownership. If such an offence results in murder it is tantamount to transgression against the builders of the society. If it terrorizes the victim, it is a breach of collective peace and tranquillity. An outrage against the people's life and breach of peace constitutes an outrage against social order and system of government. Every social system is under the obligation to safeguard individuals' lives, peace and security. This is absolutely essential for the survival of the community. In the absence of such protection, the wharp and woof of the society is bound to disintegrate and anarchy would inevitably ensue. The reason for this is that the first pillar of the social edifice would collapse. Protection of the individual's life against transgression of every kind can only be ensured when necessary punishment is enforced for the deterrence of such transgressions.

The offences we have been dealing with hitherto exercise direct impact on the society. The *Shariah* prescribes severe

punishments to deter them and disregards the personality of the offender in determining their quantum. However, to assert that these crimes have direct bearing on the society, does not mean that other offences have no bearing thereon. In fact, all offences make impact on the society in some way or the other. But all the offences do not directly affect the foundation of the society as the ones discussed above and for which rigorous punishments have been raid down in the *Shariah*. Other offences no doubt do affect social interests but they do not make any impact on the foundations of social edifice. Even if they do affect those foundations, they do not pose direct threat to them. In short, the *Shariah* has adopted a logical and realistic approach by overlooking the personality of the offender in the *case* of crimes with direct bearing on the groundwork of social fabric. Besides, the approach of the *Shariah* is realistic and logical in drawing a line of distinction between these and other offences, for there is a difference between the two kinds of offences inasmuch as their effects are not identical.

The Reason for Differentiation between Hudood Offences and Those Involving Qisas and Diyat

The *Shariah* treats the *hudood* offences and those involving qisas and *diyat as* crimes affecting the foundations of the society. But notwithstanding such an approach, it allows the victim the choice to forego punishment in the latter while such a choice has not been given in the case of *hudood* offences. The reason for this distinction is that the *hudood* offences are directly harmful to the society and that their baneful effect on the community as a whole is greater than on the individuals. On the other hand the offences involving qisas and *diyat,* though detrimental to the community, initially harm the individuals more than the community. Thus larceny, bloodshed, calumniation, drinking wine, apostasy and rebellion intrinsically constitute a menace to the society as they imperil security and peace and are an outrage to the society in a far greater degree than to the individuals. For instance if theft is committed in the house of someone, he will be grieved at loss of his possessions but not so much as he will be apprehensive of the likelihood of the rest of his possessions being stolen. Fear of larceny will first creep into the people of the neighbourhood

and then spread over the whole community. This is true of all the *hudood* offences since they are more harmful to the community as a whole than to the individuals. As opposed to them the offences of homicide and infliction of wound cause greater harm to the individuals than to the community. These offences may as such be described as personal crimes, for by committing murder the killer wants to kill a particular person and not every person. If he cannot get hold of that particular person, he will not murder anyone else. On the contrary, if the offender is a thief, he will be after goods wherever he can have it from. If he cannot get from one person he will try to steal them from another. His main object is to get hold of goods which are possessed by all individuals. Similarly the object of an adulterer is not any particular woman. Any woman will serve his purpose. If he finds it difficult to get hold of one woman, he will seek to have another.

Inasmuch as the *qisas* and *diyat* offences affect the individuals more than they do the community, the victim and his lawful guardians have been allowed the choice between *qisas* and *diyat* if the crime is committed wilfully. *Diyat* actually is a compensation for the loss suffered by victim and his guardian. The victim, moreover, has been authorized to forgive both *diyat* and *qisas.*

441. The Concept of Punishment in Customary Laws

The laws in operation till the end of the eighteenth century viewed the criminal brutally and the grounds of punishment, fear, revenge and publicity were exaggerated. The punishments acknowledged by the law included burning alive, hanging, amputation of joints, pulling out of the ears, tearing of lips and tongue, marking the body with hot iron putting a chain round the offender's neck, banishment and whipping. In most cases the punishments were not commensurate with the offence. Not only were the punishments were horrible, but offender was sometimes condemned to death for an ordinary offence. For instance, till the end of the eighteenth century, under the English law the offenders were given death penalty for two hundred ordinary crimes and these crimes included stealing of more than a shilling. Under the French law, capital punishment was awarded for two hundred and fifteen offences, most of which were ordinary ones.

Besides, in those days even the dead, the animal, stones and minerals were held accountable and liable to punishment like living human beings. In the eyes of law whether man was alive or dead or whether the thing involved was an animal or inert physical matter was amenable to legal proceedings. As warrantable a sentient and sensible living human being was subject to any penalty awarded by the court so was also a mentally handicapped or an apathetic idiot was subject thereto. Nor is this all. Judicial punishment was regarded as warrantable even for animals who are not conscious of a criminal act and incapable of defending them-selves and for animals who are devoid of any sense of crime and the pain involved in the punishment.

The basis of punishment was revenge on the offender and frightening of the non-criminal. This concept of revenge and fear gave rise to severe punishments. From this very concept also stemmed the practice of disfiguring the offender's body. It was also responsible for treating the dead, the animals and inanimate things as liable to legal action, although the dead and the non-living things are absolutely insensitive to any legal proceedings, although they feel the form of punishment and the pain caused by it. But the punishment awarded by the court cannot deter them from the act which prompts legal proceedings, because they can understand neither the proceedings nor cause of punishment awarded to them. However, by subjecting the dead, inanimate things and animals to legal proceedings and awarding punishments to them, the people could be frightened to a certain degree and the concept of revenge could be presented in a more effective manner.

At the end of the eighteenth century the philosophers and the sociologists made an attempt to replace this basis of punishments with a fresh one. Thus Roseau expounded social contract as the *raison d'etre* of punishment and maintained that the purpose of punishment is to safeguard the society against the harm the criminal may do. Beccasia justified punishment by treating it as the individual's right of defence which he foregoes in favour of the community and it is designed to chastize the criminal. The champions of French Revolution were also influenced by these opinions and incorporated them in the French law promulgated

in 1791. In the wake of this came J. Bentham, who propounded the utilitarian doctrine. According to him the *raison d'etre* of punishment was collective utility, for its object is to protect the society from crime. According to Bentham it is necessary that punishment should be adequate to prevent the offender from committing the crimes as well as to warn the non-criminals. Bentham was followed by Emanuel Kant who opined that the *raison d'etre* of punishment was justice. Some people have blended the utilitarian doctrine of Bentham with Kant's concept of justice. They hold that punishment should not be more than necessary and should not exceed the limits of justice.

The distinguishing feature of the foregoing concepts of punishment is that they all keep in view the crime regardless of the personality of the offender and take into account only the nature of the crime and its effects on the community. Hence they offer no satisfactory solution to the problem of punishment.

Next comes the scientific or the Italian view of punishment which is based on the idea of the total disregard of the offender and exclusive consideration of the offender's personality. The advocates of this view argue that punishment should be in keeping with the mental setup of the offender, his structure, historical background and the magnitude of the danger posed by his person. A person who is criminal by nature should, according to this scientific view, be isolated from the society for ever or should be executed, even if the crime committed by him is minor. Habituals also fall under this category. The person who has turned a criminal fortuitously or under the compulsion of necessity, should be given light punishment and the man who commits an offence in the heat of passion should not be awarded any punishment at all.

This scientific approach, too, proved no solution to the punitive problem, for it takes into consideration only the offender and totally disregards the crimes. Besides, it discriminates between the offenders without drawing a clear line of distinction. The result is that some offenders escape punishment while others guilty of the same offence as the former, are deemed liable to severe punishment.

Some legal experts felt that the old punitive doctrines keep

in view only the crime in total disregard of the offender while the modern doctrines take into account only the offender, overlooking the crime, and therefore they have failed to offer any satisfactory solution to the problem. So these experts propounded quite a new doctrine. According to them every crime should comprehend two concepts: the concept of correction and warning and the conception of keeping in view the personality of the offender. But this combined doctrine proved even a greater failure than all the previous punitive concepts inasmuch as it was grounded in two contradictory ideas. By keeping in view the offender's personality the purpose of the concept of correction and warning would inevitably be defeated, particularly in the case of those dangerous offences which affect the social system, morality and peace and tranquillity, and the concept of social security in the case of all sorts of crimes is a serious impediment in taking into consideration the offender's personality in respect of dangerous and minor offences alike.

It may be said that the main concern of the legal experts today is the idea that the object of punishment is the correction or reformation of the offender so as to make him acceptable to the community and a useful citizen of the country.

This is a fundamental concept. But there is an implicit idea also: if the criminal is incorrigible, then punishment is a means to purge the community of such a criminal.

There is also a third concept too, and that treats punishment as a means of safeguarding the society and frightening the person guilty of a crime. The International Congress of Punitive Law supports this concept and several European countries, including Germany, have adopted it.

The underlying idea of all the above concepts is that with regard to punishment either the crime should be the main concern in total disregard of the offender, or the offender should be kept in view to the exclusion of the crime; or else both these ideas should be combined to form the basis of punishment.

There are the punitive concepts underlying the modern laws, and we know that the legal experts hold conflicting views about them which create difficulties in providing a sound single basis

for punishment in the criminal law. Consequently, each country has adopted a separate concept as it deemed fit on the basis of prevalent thought.

In view of the multiplicity and variety of the concepts mentioned above, the International Congress of Punitive Laws adopted a resolution to profit by experience and declaring that the most useful system of criminal law is that which proves to be most effective in the eradication of crime.

The framers of the current laws tried their best to harmonize the various concepts and to counter the charges levelled against them by presenting a purely practical solution of the problem. We illustrate our point with reference to the Egyptian law as a specimen of the current criminal laws and give a summary of the concepts underlying this law:

1) The concept adopted in the criminal law of Egypt is that punishment is designed to safeguard the society. On the basis of this, such punishments have been provided for all the crimes as are considered to be adequate for the chastisement and correction of the offender and a warning to the non-criminal.

2) The framers of the Egyptian law have also incorporated in it the scientific view as well to a certain extent and have taken into account the personality of the offender. For each offence, two punishments have been provided for, whereof one is lighter than the other, and two limits have been prescribed for each punishment. Punishment is to be chosen between the two and the courts are empowered to change the one for the other in criminal cases. If punishment does not exceed the prescribed punitive limit, i.e. one year, the court can legitimately suspend the execution of the sentence. This means that Egyptian law acknowledges the penalty of the offender, but in the choice of punishment and the determination of the quantum thereof, it is not binding upon the court to take into account the offender's personality. In fact, the law of Egypt confers on the court that if the circumstances of the offender so desire, it should make allowance for the offender's person, otherwise he should be disregarded.

3). Having incorporated both these concepts in the Egyptian law it has been opined that in all the offences, particularly

the major offences, it may be dangerous to take into consideration the offender's personality in awarding him punishment. Hence, in the case of certain crimes, the court is not competent to award a punishment lighter than the limit prescribed nor can it suspend the execution of punishment. Thus, this principle has been incorporated in the Narcotics Act of 1928, Defraudation Act of 1941, and the Arms Act of 1941. Logic demanded that once adopted, this principle should have necessitated amendment in the whole Egyptian Penal Code and made it binding upon the courts to disregard the circumstances of the offender in criminal cases posing a threat to the security of the community, such as defraudation, trafficking of narcotics and unauthorized possession of arms. But this has not been done with the result that an unfortunate situation has arisen. On the one hand mitigation in punishment or suspension thereof is prohibited by Acts relating to defraudation, narcotics and keeping arms illegally, while on the other hand, in the grave cases of misappropriation, embezzlement, bribery, homicide, adultery and calumniation, both mitigation and suspension of punishment are warrantable, in spite of the fact that all such offences pose greater danger to the existence and security of the society than the ones relating to narcotics, unauthorized arms and cheating.

This then is the position of the current law with respect to punishment, in which the principle of correction and warning has been adopted and considered it necessary to keep in view the offender's personality in the determination of the quantum of punishment, but subsequently the offender is overlooked in certain offences. So far as the first principle is concerned the law is clear but as regards the latter two principles, the law is ambiguous and illogical, as it has failed to delimit the sphere wherein both these principles would operate.

442. The Shariah Versus the Current Law

A study of the *Shariah* doctrine of punishment and the views of punishment incorporated in the laws in operation would enable the reader to realize that the *Shariah* embodies all the concepts included in the enactment's since the end of the eighteenth century down to the present day. The object of punishment in the

Shariah is the promotion of the common good, reformation of individuals, security of the community and endowing the society with the power of defending itself against crime. Besides, the punishments as provided for in the Shariah are commensurate with the requirement of the society, neither more nor less. Thus they are based on justice as well as on the fitness of things. These are the views propounded by Rosseau, Becania, Benthem and Kant respectively. Again, one of the objects of the *Shariah* punishment is also to reform the offender and do good to him. This inevitably requires that the personality of the criminal should not be ignored. Such a requirement conforms to the scientific view.

Although the *Shariah* includes all the penal views incorporated by the laws in force since the eighteenth century down to the present day, yet it is free from all the flaws involved in modern views and is not amenable to the criticism to which these views are subject.

Perhaps it may astonish some people that the Islamic *Shariah* embraces a comprehensive, scientific and technical theory of punishment, which does not admit of criticism from any angle; that the modern man-made law has been able to reach the present stage of its development by following the example of Islamic *Shariah* and that it has yet to achieve the perfection that characterizes the *Shariah*. However, from the stage of development it has reached at the lines on which the process of its development continues, it may be judged that its evolution will, in future, pursue the course laid down by the Islamic *Shariah*.

It may now be claimed that there is no difference between the *Shariah* and the modern laws in force so far as the principles and elements whereon punishment is based. The difference lies in the mode and sphere of the adaptation of these principles. The *Shariah* applies all the principles acknowledged by the modern laws, but it does not combine all of them in all the punishments, nor does it treat all the crimes at par. It delimits a specific sphere for each principle, wherein it operates alone or together with some other principle. At the same time it identifies clearly the distinguishing marks of each sphere, so that there can be no mistake about it. The *Shadah* has thus presented to mankind a

flawless, logically correct as well as practical doctrine of punishment which cannot be subjected to criticism. On the contrary, the modern laws combine all principles indiscriminately and treat all the offences on equal footing with the result that the legal experts have failed to arrive at an acceptable solution to the problem of punishment and have not been able to formulate a scientific doctrine thereof. No sooner these laws succeed in applying the principles of punishment in harmony with the expediencies of the society and the individuals and with the nature of things, than they will be constrained to determine a distinct sphere of operation for each principle and to disregard the offender in crimes affecting the society. As soon as they attain to this stage of development, they will be completely in harmony with the Islamic *Shariah.*

We consider it essential to mention at this point that towards the end of the eighteenth century the law in force was inhuman and barbaric. Under this law the living and dead humans as well as animals and non-living things were all indiscriminately awarded the punishment of disfiguration and public exposure of an offender. At the end of the eighteenth century, however, when the law adopted the *Shariah* principle that the basis of punishment is the reformation and deterrence designed to safeguard the society, the modern law assumed human character. Consequently, disfiguration and public exposure of the offender was stopped and the practice of legal proceedings against the dead human-beings, animals and non-living things was given up as it was acknowledged to be futile. This principle was incorporated into the modern law as late as the eighteenth century, where as the Islamic *Shariah* had embraced this and other principles in the Seventh Century A.D It was because the principle in question that the *Shariah* treated only the living humans right from the very first day as liable to criminal accountability. It never held dead people, animals or non-living things accountable, nor did it ever support disfiguration or public exposure of the criminal. In fact, it strictly discarded such obnoxious practice. The Holy Prophet (S.A.W.), for instance, forbade disfiguration of even a rabid dog. One cannot, therefore, imagine that he could have allowed the disfiguration of a human being. The *Shariah* can well be proud of the fact that it adopted such a noble principle eleven centuries earlier, whereas mankind

has been applying for the last two centuries only. Still the Shariah is much ahead of the human thought.

443. Conditions of Punishment

The *Shariah* lays down the following essential conditions for every penalty:

(1). Punishment should conform to the provisions of the *Shariah.* A punishment would be deemed as conforming to the *Shariah* only when it is warranted by the source of the *Shariah,* i.e. the Holy Quran, the Sunnah, or the consensus, or else it is decided by a legislative body. The essential condition of awarding punishment by the people in authority is that the punishments are not repugnant to the *Shariah* provisions; otherwise they would be void.

The result of a punishment being one provided for in the *Shariah* would be that the court would not be competent to award another punishment, although it may deem such punishment better than the one prescribed in the *Shariah.* Some people believe that the *Shariah* has conferred oppressive power on the court or the judge in respect of punishment. This is far from being true. Such an impression is the result of ignorance. The truth of the matter is that the *Shariah* classifies punishments into *hudood,* qisas (retaliation) and *ta'zeers* (penal punishments). The penalties of *hudood* and *qisas* are invariably prescribed. The court has no power as to these penalties. When the offence is established, it will have to award them as they have been laid down without making any change. For instance, the punishment prescribed for larceny is amputation of hand. If the offence is proved, the court cannot pass any sentence other than amputation of hand, unless there is something contrary thereto in the *Shariah,* as for example the stealing by the father of some belonging to the son. The punishment laid down for adultery by unmarried couple is a hundred stripes. After the establishment of such a case of adultery, the court cannot but award the punishment so prescribed. It has no power at all to increase or decrease a single stripe or change the punishment into some other penalty. Again the punishment prescribed for felonious homicide is retaliation *(qisas), or* execution.

If the crime is proved, the court is bound to award this punishment to the killer. It is not competent to pass any other sentence unless there is something in the *Shariah* incompatible with such a penalty. Thus the powers of the court are extremely limited in respect of *hudood* and *qisas*.

As regards *tazeers* the court enjoys wider powers, but they are not oppressive. In the case of tazeer offences, the *Shariah* has laid down a collection of penalties which range from rebuke to the harshest punishment such as life imprisonment or execution. The court has been empowered to choose any penalty out of the above collection as it deems fit for the crime and the offender and determine the quantum of punishment between the maximum and the minimum limits. No doubt, by conferring on the court wider powers, it is enabled to give the right verdict and award such a punishment to the offender as ensures the protection of the community on the one hand, and reformation of the offender on the other. This judicial power, though wide enough, is not oppressive, for the court is not competent to award a punishment which is not provided for in the *Shariah,* nor can it award one that is not fit for the offender. Probably the wide powers allowed to the court has given the wrong impression that the judicial powers provided for in the *Shariah* are oppressive.

The exercise of extensive powers conferred on the court is not essential. The person in authority can set a limit on these powers if the public good so requires. In other words, provision for extensive powers for the court is also subject to common good.[1]

(2) Punishment should be personal. Another essential condition of punishment is that it should be limited to the person of the offender and should not involve any non-criminal. This condition is actually one of the principles of Islamic *Shariah* which has already been discussed in the context of accountability.[2]

(3) Punishment should be of a general nature. One of the conditions laid down for punishment is that it should be of a general nature and could be awarded to all the people alike, regardless of their status; for the ruler and the ruled, the rich and

1. See article 97 and the sequel.
2. See articles 281,471.

the poor, the illiterate and the educated are equal in the eyes of the Shariah.

However, this complete equality in the *Shariah* as to punishment, concerns only *hudood* and *qisas;* for penalty for the *hudood* and *qisas* offences is determined and as such is not amenable to change. Therefore, any one who is guilty of such an offence will get the fixed punishment, whose quantum and nature would be the same for all the people.

But if the punishment to be awarded is *ta'zeer*, then equality in its quantum and nature is not essential, for if equality in *ta'zeers* is treated as inexorable, a *ta'zeer* would assume the character of a *had.* The point here is that the effect of punishment should be equal, and the effect produced thereby is deterrence and reformation. Some people may possibly be prevented from committing an offence only by intimidation, while others could not be prevented only by corporal punishment and imprisonment. Thus if several people guilty of the same offence are given different punishments in consideration of their circumstances that make them desist from committing the offence, then equality is established

CHAPTER VIII

KINDS OF PUNISHMENT

444. Punishments May Be Classified into Four Kinds on the Basis of Their Correlation:

(1) The Primary Punishments:

These are penalties originally prescribed for an offence. For example, prescribed punishments for homicide, for fornication and theft are retaliation, stoning to death and amputation of hand respectively.

(2) Substitutionary Punishments:

If there is something inhibiting primary punishment, then some other punishment would be awarded instead of it. Such a punishment would be called substitutionary punishment. For instance, in case of invalidation of *qisas, diyat* would be substituted. If *had* and *qisas* become null and void, *ta'zeer* would take their place.

These alternate punishments are themselves primary punishments before they are awarded as substitutes. They are awarded as alternative to harsher punishments when the latter cannot be applied. For instance, in case of quasi-homicide, *diyat* is the prescribed original punishment and in case of *ta'zeer* offences, *ta'zeers* are the original or primary penalties. But if on grounds of *Shariah* injunctions a *had* or qisas punishment cannot be awarded and instead of it *diyat* and *ta'zeer* are awarded, then these punishments would be substitutionary.

(3) Subsidiary Punishment:

Subsidiary punishments are those which the offender has to undergo as the result of primary punishments and for which no separate order is needed; for example, for a killer deprivation of inheritance, since disinheritance is a consequence of homicide

committed by him and as such it needs no separate order. Or take another example: a slanderer is disqualified from giving evidence. Here too disqualification does not require a separate sentence, inasmuch as the person who is awarded punishment for slander is automatically disqualified from giving evidence.

(4) Complementary Punishments:

Complementary punishments are the penalties awarded on the basis of the order regarding primary punishments and for which a separate sentence is also passed.

The complementary punishments bear affinity to subsidiary punishment inasmuch as both the punishments owe themselves to the sentence of primary punishments. The difference, however, is that no separate sentence is needed for the subsidiary punishments, while separate sentence must be passed for complementary punishments. An example of complementary punishment is that the amputated hand of a thief is to be hung from his neck till he is set free. The hanging hand owes itself to the punishment of cutting it off, but it is warrantable only when a separate order is passed for it to be operative.

445. Punishments Are Classified into the Following Kinds in Relation to Judicial Power as to the Determination of the Quantum thereof.

1) Punishment with a single limit:

As regards such punishments the court has no power to enhance or mitigate the quantum thereof, although they may naturally admit of mitigation or enhancement, such as rebuke, exhortation or flogging.

2) Punishments with two limits:

These punishments involve two limits; minimum and maximum. The court has the power to choose any penalty between them as it may deem fit; for instance, imprisonment and flogging as *Ta'zeer.*

446. Punishments Are Classified into the Following Kinds in Accordance with *Obligatory Injunction:*

1) Determined punishment:

Punishments whose nature and quantum have been determined by the law-giver and has placed the court under the obligation to apply them unchanged without enhancement or mitigation. Such punishments are known as Obligatory Punishments, because the person in authority is not competent to nullify or remit them.

(2) Non-determined punishment:

Punishments in respect whereof the court is empowered to determine the quality and quantity of punishment as it deems fit, in consideration of the offender's circumstance. These are known as 'Optional Punishments', since the court has the option to award any of the given penalties.

447. Punishments Are Classified into the Following Kinds in Relation to the Object thereof:

1). *Corporal Punishment,* viz.: punishments inflicted on the human body such as execution, whipping, imprisonment etc.

2). *Psychical Punishments:* Punishments whose object is the offender's mind rather than body, such as exhortation, intimidation and threatening.

3). *Pecunary Punishments:* Punishments whose object is the material possessions of a person, such as *diyat*, mulct and confiscation.

448. Punishments Are Classified into the Following Kinds in Accordance with Offences:

1). *Punishments of Hudood,* i.e. prescribed punishments for *hudood* offences.

2). *Punishments of Qisas and Diyat,* i.e. punishments prescribed for offences entailing retaliation and blood money.

3). *Punishments of Expiation:* Prescribed punishments for certain qisas and *diyat* offences as well as certain *ta'zeer* offences.

4). *Penal Punishments,* viz.: Punishments prescribed for *ta'zeer* offences.

This is the most important classification of punishments. We proceed to dwell on each kind separately. We would in the

sequel show in two sections the extent to which the *Shariah* punishments are efficacious as well as the degree to which the Egyptian law is efficacious respectively.

SECTION I

449. THE HUDOOD PUNISHMENTS

Hudood punishments are those prescribed for offences calling for hudood. Such offences are seven:

(1) Adultery or Fornication
(2) Qazaf
(3) Drinking Wine
(4) Larceny
(5) Bloodshed
(6) Apostasy, and
(7) Rebellion.

The punishment laid down in the *Shariah* for each of the above offences is termed as *had* (the plural whereof is *hudood).*

Had is a punishment prescribed by Allah and constitutes His right. It is laid down in the interest of the society. When jurists say that such and such punishment is the right of Allah, they mean that the punishment in question cannot be annulled by the society. In other words, any punishment which has been declared obligatory in the public interest and is designed to eradicate corruption and ensure peace and security, is the right of Allah.

These punishments are characterized by three peculiarities:

(1). The object of the *hudood* punishment is to reform the criminal and to serve as a deterrence to others. When awarding, the person of the offender is taken into account.

(2). These punishments are treated as penalties with one limit, although some of them admit of two extremes. They are treated as having a single limit, since they are invariably fixed and obligatory and as such the court is not competent to mitigate or enhance or change them.

(3). The punishments have been contrived to counter the motive at work behind a crime. In other words, they are rounded on strong psychological ground.

A. PUNISHMENTS OF ADULTERY

450. Punishment for Adulterer.

There are three punishments laid down in the *Shariah* for adultery:

1. Whipping. 2. Banishment. 3. Stoning to death.

Whipping and banishment are punishments to be simultaneously awarded to an unmarried adulterer. Stoning to death is the punishment of a married adulterer. If the adulterer and adulteress are both unmarried, both of them shall be whipped and banished. If both of them are married, both shall be stoned to death. However, if one is married and the other unmarried, the former shall be stoned to death while the latter shall be whipped and banished at the same time.

451. The Punishment of Whipping and Flogging

The *Shariah* has prescribed the punishment of a hundred stripes for an unmarried adulterer and adulteress. This is a punishment with a single extreme, although it naturally admits of two extremes. It involves only a single limit because the *Shariah* has determined a hundred stripes. Says

Allah:

> "The adulterer and the adulteress, scourge each of them with a hundred stripes. And let no pity for the twain withhold you from obedience to Allah, if ye believe in Allah and the Last Day. And let a party of believers witness their punishment." (24: 2)

The *raison d'etre* of flogging as a punishment is to repulse criminal motivation by deterrent motivation. This is the raison d'etre which we arrive at by the contemplation of crime and punishment.

The motive of adultery is pleasure and the exhilaration that follows it. The only motive which counters the motive of pleasure is pain and torture, for if a man experiences torture, it will not be possible for him to be pleased and exhilarated. In other words, the Shariah has not prescribed for nothing a hundred lashes as punishment for adultery. In fact, this punishment is based on human nature and psychology. It offsets the operation of the

psychological factors of adultery by bringing into play the contradictory psychological factors. Now if the motivating factors of adultery get the better of the repulsive factors and the debauchee consequently commits adultery, the pain caused by the prescribed punishment would make him forget the pleasure derived from the offence and he will never think of deriving such pleasure again.

Punishment of whipping according to the Law in Force

Till 1937 the Egyptian law acknowledged the utility of the punishment of whipping and was instrumental in the reformation of youths. But then, following the precedence of most of the operative laws in other countries, abolished this punishment.

In the modern age, most of the legal experts are trying to revive the concept of flogging as a punishment. In fact, a proposal has already been presented in France for the restoration of flogging for violence and excesses. It has been maintained in the proposal that the habits of the people are undergoing revolutionary changes and the masses tend to resort to violence and use of force for the settlement of disputes. Besides, the outward form of crimes, too, are remarkably different from what they used to be in the past. They are getting more and more vehement and acrimonious. Hence the only way to maintain peace and ensure security is to restore corporal punishments, whereof flogging is the best.

Flogging as a punishment has been opposed on two grounds: First, expression of hatred for corporal punishment. Second, flogging is repugnant to human dignity. It has, however, been answered that the peculiarity of flogging is that it is oriented towards the physical sensibility of the offender. What terrifies the offender most is the physical torture. Hence in order to terrify him, we must take advantage of his psychology. As for the objection that the punishment of flogging is repugnant to human dignity, it is baseless; for as the offender does not care for his dignity and honour, the argument in favour of his dignity carries no weight at all.

The advocates of flogging as a punishment argue that this punishment is confined to those offenders on whom other kinds of punishments do not produce the desired effects, whether such

offenders are adult or juvenile. Some of these criminologists reserve flogging for offences like use of liquor or other intoxicants, defamation, plunder, theft, demolition of walls, destruction of crops, killing of animals, and all such crimes as manifest callousness and apathy. These experts hold that flogging has been fully established to be the best punishment for the reformation of the prisoners. This ensures security of system in their vicious group. It is, therefore, essential according to these criminologists to attach fundamental importance in the law of punishment of whipping and it should be treated as a means of reformation of the non-prisoners.

Jado regards flogging as an improper punishment. He maintains that such a punishment involves the risk of abuse. Besides, he argues that if flogging is restored, the legislators will start vying one another to prescribe rigorous punishment.[1]

Although the punishment of flogging has been done away within the modern criminal law, yet it has been retained in the laws of some countries. For instance, in the criminal law of England, flogging is included as one of the basic punishments. In U.S.A. prisoners are whipped by way of punishment. In the military and police laws of Egypt and England, too, flogging constitutes a basic punishment. So also is the case with the laws of many other countries.

During the Second World War a majority of the countries revived the punishment of whipping. It was also applied to the civilians found guilty of hoarding and profiteering. The fact that the above countries were compelled to enforce the punishment of flogging during the war is a strong point in favour of this punishment and is tantamount to admission on the part of the advocates of the modern law in force that imprisonment alone is of no avail in making the people abide by the law.

Acknowledgement of this punishment in the military also bears testimony to the fact that whipping as a punitive measure is indispensable to the inculcation of discipline in the troops and goading them to the obedience of law. As far as the civil life is concerned, the civilians need this form of punishment more than the troops, for the former are now absolutely devoid of discipline

1 *Al Mausoo'at ul-Jana'iah*, Vol. V, p.53 and sequel.

and sense of obedience. It sounds illogical that discipline and obedience of law is necessary for the members of armed forces, but not so for the civilians. Do the civilians not belong to the same nation as the armed forces do? Is there any harm if all the individuals of a nation observe discipline and become law-abiding citizens?

Views of law experts belonging to different countries about the punishment of whipping have been explained above. If any one objects to punishment in question despite these expert opinions, he can well contend that the entire world is in the wrong except himself. He may say whatever he likes, but he cannot assert that the punishment of whipping has proved needless pragmatically.

Punishment of Adultery As Provided for In Laws In Force

The punishment provided for in the laws in force for adultery is imprisonment. But this punishment does not involve the physical torture that may goad him to abstain from the carnal pleasure derived from adultery; nor does *it* bring into play such antidotal psychological factors that would curb or divert the action of the motivating factors at work behind sin. As a matter of fact the punishment of imprisonment adds to immodesty. The teeming millions in the world shun adultery not for fear of imprisonment but because of their religious beliefs and the moral excellence engendered by religion.

The distinguishing characteristic of Islamic *Shariah* is that it has provided a psychological antidote to adultery by prescribing lashes as the punishment thereof. This is the only effective remedy for it. On the contrary, imprisonment does not bring about any psychological reformation in the offender. It does not rid him of adulterous motivation, nor purifies evil propensities in his feelings. Hence the punishment of imprisonment may be effective in other offences but not in the case of adultery.

452. Punishment of Banishment

The Islamic *Shariah* also provides that an unmarried adulterer should be banished for one year after being flogged. The Holy Prophet (S.A.W.) says:

"Punishment of a young man and woman found guilty of

adultery is a hundred lashes as well as banishment for one year."

However, three is no unanimity among the jurists of Islam about this tradition. According to Imam Abu Hanifa and his disciples, this Hadith stands nullified or is at least unknown. They opine that if the punishment of banishment is to be treated as warrantable, it is in the nature of *ta'zeer* and does not constitute a *had*. Imam or the person in authority may in his individual judgement add banishment to the prescribed punishment of lashes.[1] Imam Malik is of the view, oil the other hand, that the punishment of banishment is included in the *had* to be undergone by the male offender and not the female.[2] Imam Shafi'ee and Imam Ahmed, however, maintain[3] that banishment is included in the *had* punishment of both the adulterer and the adulteress.[4]

The jurists who support the punishment of banishment say that by banishment is meant the expulsion of the offender guilty of adultery from one town to the nearest town situated within the territory of a Muslim state or Dar-ul Islam.

Imam Malik is of the opinion that the adulterer will be imprisoned in the town to which he is to be banished.[5] According to Imam Shafi'ee, he will be kept under observation in the town to which he is to be expelled.[6] If it is feared that he would run away from there or return to the town wherefrom he is expelled, he shall be imprisoned.[7] On the contrary, Imam Ahmed maintains that the banished adulterer shall not be imprisoned.

The punishment of banishment is actually complementary to lashes. There are two reasons for which we hold this opinion:

(1). To make the people forget the offence as soon as possible. For this it is necessary to remove the offender from the

1. *Sharh Fath-ul-Qadeer,* Vol.4, P.134 and the sequel.
2. *Sharh ul Zurqani,* Vol.8, p.83.
3. *Asna-ul-Matalib.* Vol. IV, P. 129 and *Al Mughni,* Vol. .10, PP. 135-144.
4. According to Imam Malik the punishment of banishment is intended for a free male. It does not apply to a woman or slave. Imam Ahmed is of the opinion that it is intended for both a free man and free woman while Imam Shafi'ee opines that it is applicable to all free men and women as well as a slave.
5. *Sharh al Zurqani.* Vol. VIII, P.83.
6. *Asna-ul- Matalib,* Vol. IV, P.130.
7. *Al-Mughni.* Vol. 10 P. 136.

place of offence, for, if he lives in the community wherein he commits adultery, the memory of offence will remain fresh ill the memory of the people.

(2). If the offender is removed from the place of offence, he will be guarded against many an odd. For instance, by living in the same town, he would not only find it difficult to earn his livelihood, but would also face ignominy and disgrace. In some other town he will not be confronted by such a situation. In fact it will be possible for him there to start afresh an honourable life.

From what has been stated above, it may be seen that the offender stands to gain more than the community in the punishment of banishment. Even in the present age of immodesty when an adulterer is made the target of censure, he leaves the place where he commits the offence in order to avoid infamy and dishonour.

453. Stoning to Death

Adultery committed by a married man or woman is punishable by *'rajm'*, which means execution by stoning. No verse exists in the Holy Quran enjoining stoning to death or *rajm.* For this reason, the *Kharijees* or schismatics refuse to acknowledge such a punishment. They believe that both the married and unmarried adulterer and adulteress are liable to the same punishment. But all the sects of Ummah with the exception of the *Kharijees* are agreed on *rajm*, inasmuch as the Prophet (S.A.W.) enjoined *rajm.* After him there was consensus among his companions on this punishment. An oft-quoted tradition in this context is as follows:

> "Killing of a Muslim is lawful for one of three acts: infidelity after embracing Islam, adultery after marriage, and murder of any one without any reason.

According to a tradition the Holy Prophet (S.A.W.) ordered the adulterer and adulteress named 'Ma'iz and Ghamidia when a woman was guilty of adultery with her servant to be stoned to death. Thus both the edict and practice of the Holy Prophet (S.A.W.) bear testimony to the punishment of *rajm.*

The basis of *rajm* is the same as that of lashes prescribed for an unmarried person guilty of adultery. But the punishment laid down for a married offender is harsher because of wedlock,

inasmuch as in such a state a man or woman's mind is generally purged of the propensity for committing adultery. Now if a married person thinks of enjoying a woman or man out of wedlock, it means that he or she is overwhelmed by sexual desire and has an irresistible temptation to derive unlawful carnal pleasure from adultery. Hence it is necessary to prescribe such a painful and tormenting punishment that if the offender compares the unlawful pleasure he wishes to have and the punishment thereof, the dread of pain overcomes the prospective joy.

In the present day the people regard the punishment of *rajm* as a bit too harsh. But if any one finds his wife or daughter involved in fornication, he kills her along with her paramour. The criteria of *Shariah* with regard to this problem are as subtle and just as they are in its other injunctions. A married adulterer or adulteress presents the most odious example of sin and the *Shariah* would have it eliminated from society, because the *Shari'ah* stands for chastity, moral excellence, legitimacy of descent and for a life free from promiscuity and moral aberration. It, therefore, makes it obligatory for every one to keep in control his or her sensual desires and gratify it in a lawful manner (i.e. by marriage). When the upsurge of sensual desire is at its height, marriage is imperative under the *Shariah* so that the person concerned does not go astray and run wild. If he does not marry and the desire gets the better of his reason and the gratification thereof becomes his sole concern, then he is liable to a hundred lashes. This lesser punishment is warranted by the fact that he takes the wrong course because of delay in marriage. But after being once married, the *Shariah* leaves no scope for excuse. That is why it does not enjoin wedlock as a perpetual bond so that if the relations between man and wife are strained, neither of them becomes' lewd. The wife is permitted to protect her chastity at the time of nuptials- She is also allowed to seek divorce if the husband leaves her or disappears, falls sick or becomes penniless or she receives any harm. The husband is free to divorce his wife at any time and have more than one wife provided that he can be just to his wives. In short, The *Shariah* has kept open the doors of all the lawful courses for a married person while banning all the unlawful courses. When the offence inciting factors have been done away

with from the standpoint of both nature and reason, justice demands that no excuses should be entertained for the mitigation of punishment and the married adulterer or adulteress should be awarded such a punishment as is appropriate for an incorrigible or irreclaimable criminal.

If those who are so much upset by the death penalty of an adulterer ponder the actual position they would realize that the *Shariah* has prescribed this punishment according to the liking of the people. Under the law in force, adultery by a married person is punishable by imprisonment and for an unmarried there is no punishment if the offence is committed by the mutual consent of the couple. But are the people happy over this provision? They are never happy nor will they ever be. They have accepted this provision under compulsion as they have accepted the *Shariah* injunction volantarily. The people actually retaliate by killing married and unmarried persons guilty of adultery and the methods they adopt for killing are more painful than *rajm*. For instance, the adulterer is drowned or burnt alive; his or her joints are amputated or bones are broken. In short he is completely disfigured. The least painful mode of killing is that the offender is poisoned. Fifty percent of the persons killed for various crimes consist of those guilty of adultery. If the actual position in effect is this, then how can *rajm* be regarded as dangerous? To adopt the punishment of *rajm* means acknowledgement of the actual position. Such an acknowledgement is not only commendable but also expressive of courage. We ought to accept reality and admit the actual position with regard to *rajm*.

Some people think that *rajm* is a brutal punishment. We say that it is actually death penalty, like the capital punishment as provided for various offences in most of the laws in force in the world today. It makes no difference whether death is caused by hanging, slaying with a sword, administering gas, electrocuted, shooting or stoning. Death is death, whatever the method of causing it. If someone thinks that a man is killed quickly by a bullet and by stones slowly, he is gravely mistaken; for it sometimes happens that bullet does not hit the target and, therefore, killing is delayed, but stones hit the fatal target and death occurs instantaneously. The number of shooters is very limited, while those who stone

the offender are numerous. They keep on throwing stones until the adulterer breathes his last. Just imagine a man being stoned by hundreds of people. Will he not die more quickly than being shot?

Experience has shown that sometimes hanging does not cause the offender to breathe his last and it takes time to put him to death. It has also been proved by experience that a single stroke of sword fails to decapitate the offender and beheading is not an easy method of execution. Similarly, administration of gas and electrocution takes more time to cause death than hanging and shooting.

As a matter of fact to think of death to occur quickly is incompatible with the concept of punishment, for if death does not involve pain and agony, it would turn into the most ordinary punishment, for the people do not dread death so much as they do the pain and agony associated with it. True that agony and torment is of little consequence for one who is to die but agony and torment are absolutely essential to warn and frighten other individuals of the community. Obviously it is not in the interest of the society that its members come to believe that the punishment of such and such offence is very light and not to be afraid of. The Quranic verse relating to adultery explains this point:

"And let not pity for the twain withhold you from obedience of Allah." (24:2)

"And let a party of believers witness their punishment." (24:2)

The reason for this is that if the offenders are treated leniently, they will begin brazenly committing offences; whereas the element of pain involved in punishment aims at the chastisement of the offender on the one hand and warn the non-offender on the other.

454. A Note on the Punishments Prescribed for Adultery.

The *Shariah* punishments for adultery have not been prescribed at random. They have in reality been laid down taking into full account man and his mind, his instincts and feelings. The interest of the community and the individuals both have been kept in view in the determination of these punishments. Hence they are legal as well as academic penalties. They are

academic because they have been devised on psychological basis, and legal because they are designed to eradicate crime. This is characteristic of all the punishments laid down by the *Shariah* for crimes involving *hudood,* retaliation or *qisas* and *diyat.* As opposed to the *Shariah,* the law in force is devoid of this quality.

Doubtless, the only punishment that can serve the purpose in view would be the one prescribed in consideration of the offender's psychology, for such a punishment would root out criminal tendency from his mind. It will not only ensure the security of public good but will also fully meet the demands of justice. It will neither do wrong to the offender nor will overtax his capacity to endure. Obviously, a punishment based on the nature and psychology of man can never be oppressive and transgressive. Also, a punishment of this kind would be in complete harmony with the principle of justice, for if it does justice to the individual, would certainly be just to the collection of individuals too. Again, in the punishment prescribed by the *Shariah* the right of the society is treated as of paramount importance and the community is not sacrificed for the sake of the individual. On the contrary, a punishment prescribed in the interest of the individual as opposed to that of the community undermines the interest of both the individual and the community, inasmuch as it fosters crimes, causes breach of peace and leads in the ultimate analysis, to disorder in the society, which in its turn destroys both the individual and the community.

The punishment of adultery laid down by the *Shariah* has played a vital role in the eradication of this crime at every place and at every time in history. Its impact may be seen even today in countries where the *Shariah* had once been in force. In fact, its impact is manifest in the situation obtaining even today or even in conditions that have been prevalent during the past forty to fifty years. It is needless to say that the *Shariah* has not been in operation during these years, yet its effects are so intense that they still inhere in our traditions, morals and habits, though they are gradually on the wane with the passage of time.

The difference between the Islamic East and the Western countries also exemplifies the immense impact of the *Shariah,* in spite of the fact that Western laws have been in force since a

long time in the East. The Islamic East has been living not only under the Western law but has also been following the West in every sphere, and even in matters relating to morality and honour. Nevertheless the East regards adultery as the most detestable and heinous crime and one guilty of it is regarded as a contemptible wretch. With the Easterners no punishment is too severe for an adulterer. On the contrary, the people of the West do not generally care for this offence as they attach little importance to morals and honour. Hence the difference between the West and the East in this regard is, in reality, the difference between the *Shariah* and the modern law. The result is that the just punishment of the *Shariah* has brought forth a just and righteous society which is based on moral values, whereas the light and benign punishment prescribed by the modern law has produced a corrupt and depraved society in which lust and sensual desires predominate.

B. The Punishment of Qazaf

455 Lashes and Disqualification from Testification.

The *Shariah* has laid down two punishments for *qazaf* (false imputation of adultery). One of them is primary or basic which consists of flogging and the other subsidiary consisting of disqualification of the person guilty of *qazaf* from bearing witness. The testimony of such an offender has, therefore, no validity.

The punishment of lashes in itself is a penalty with two limits, but in the case of a slanderer or one guilty of *qazaf,* it entails only a single limit inasmuch as the number of lashes has been determined and the court has no powers to mitigate or enhance or change it. This punishment has been laid down in the following Quranic verse:

> "And those who accuse honourable women and bring not four witnesses, scourge them with eighty stripes and never afterward accept their testimony. They indeed are evil doers."
>
> (24:4)

It must be borne in mind that the *Shariah* punishment for *qazaf* is applicable only when the imputation of adultery is a fabrication and is as such false. But if it is true, such an imputation is no offence and, therefore, not punishable.

The motives of slanderous fabrication and lying therein may be jealousy, personal grudge and revenge and the object in all these cases is to torture and render contemptible the person to be calumniated.

The punishment prescribed by the *Shariah* for *qazaf* is to defeat the purpose thereof. The slanderer wants to inflict mental torture on his victim and for this reason flogging has been laid down so that the slanderer is physically tormented, inasmuch as physical torture is opposed by psychological torture. The former torture produces greater effects on the mind and feelings of the offender, psychological torture is actually a part of physical torment. If the slanderer renders contemptible and mortifies his victim on individual plane, its appropriate requital is that the entire society should disdain and scorn him and this general contempt should form a part of his punishment and as the result of general contempt the offender should lose his confidence with the result that his testimony becomes unacceptable and he is declared as an evil doer for ever.

In this punishment also the *Shariah* has repulsed the motives of the offence by opposite psychological factors in order that these factors may overcome the criminal motives and consequently the commitment of crime is prevented. In fact, the offender would shrink from the very idea of committing the offence.

456. Punishment of Qazaf as Provided for in the Law in Force.

According to the law in force, *qazaf* is punishable by either imprisonment or mulct or both. Both these punishments are not effective deterrent to calumniation. That is the reason why slander and abuse is extremely common in present day society and the people in general and political workers, in particular, accuse and abuse one another in a give and take manner. Everybody seems beset with the thought of disdaining and debasing his opponent and calling into question right and wrong so that the way of his aggrandisement is clear. This goes on to such an extent that opponents are disgraced and mutual relations are severed. Thus shameless examples of self aggrandisement are set in the society.

If the law in force is replaced by the *Shariah,* nobody will be so audacious as to tell lies against others, for false accusation

will be punished by lashes and the slanderer will be cast out of public life and deprived of leadership, nobility and social status. As the evidence of liar has no validity under the *Shariah,* his right to sit in judgement is void. Such a person is not fit for leadership and governance inasmuch as a wrong-doer and sinner cannot be entrusted with the responsibility of running the affairs of Muslims.

The deplorable situation prevalent in Egypt is to be found in almost all the democratic countries of the world. Some thinkers are of the view that this is a sort of temporary phase of democratic life, since difference of opinion is the very essence of democracy. Democracy requires different political parties with their different programmes based on divergent modes of thinking. Other thinkers regard it as a dangerous malady fatal to social order. They maintain that this unfortunate state of affairs will continue as long as democracy exists. To my mind both the group of thinkers are wrong. Democracy (consultative body) does not by nature require that offences are committed and people are induced to commit them. The truth of the matter is that evil thrives because there is nothing to curb it or there is no deterrent punishment preventing the people from committing an offence.

The concept of reward and punishment is universal. It existed in the spiritual days of old as it exists in the modern materialistic age. The Caliph Hadrat 'Umar (R.A.A.) did not do justice for worldly gains. He did it for a reward in the Hereafter. He took meticulous care to avoid doing injustice for fear of punishment in the Hereafter. The rulers of today do justice for being popular and avoid doing injustice for fear of losing their high positions. The ancient scholar wrote for the sake of Allah's pleasure and for a reward in the Hereafter. Whatever he left out, he did so for fear of Allah's displeasure. On the contrary, the scholar writes with the intention of becoming popular and famous. He excludes from his writings whatever he fears to cause people's resentment, thereby lowering his market value. Formerly a worker used to work to perform his duty conscientiously towards his employer, seeking thereby Allah's pleasure. He never neglected his duty lest Allah should be displeased with him. But today the worker performs his work in order to get quick remuneration from his

employer or to get his wages enhanced. He does not shirk his work, for fear of losing his job.

In short this is the demand of human nature which does not change, although its manifestations vary. Man is always desirous of a reward and avoids whatever entails punishment or loss of gain. Hence wisdom demands that his nature should be taken into account in his guidance and chastisement. *Shariah,* therefore, turned human nature to its account and grounded its injunctions on the basic qualities of fears and hopes and strength and weakness of human nature. That is why these injunctions are universal suited to every age and every place. Just as human nature is uniform everywhere and is not affected by temporal changes, so also was the Islamic *Shariah* suited to ancient times as it is to the present and will be suited to the future.

C. PUNISHMENT OF DRINKING WINE

457. The *Shariah* has prescribed eighty lashes for drinking wine. This is a punishment with a single limit and the court is not competent to reduce or enhance or change it.

But Imam *Shafi'ee,* as opposed to all the other Imams, claims that it is forty lashes. He argues that it is not established that the Prophet (S.A.W.) awarded more than forty lashes and, therefore, the remaining forty lashes are in the nature of *ta'zeer* rather than hud.

The source of this punishment is the following saying of the Holy Prophet (S.A.W.):

> "The person who drinks wine, scourge him with lashes and if he drinks it again, lash him again."

The unlawfulness of wine is testified by the Holy Quran itself. The position with regard to the quantum of punishment for drinking wine which is nearer the truth is that eighty lashes or stripes were laid down during the period of Hazrat 'Umar's Caliphate. Hazrat 'Umar (R.A.A.) consulted the companions of the Holy Prophet (S.A.W.) on the quantum of punishment to be prescribed for drinking wine. Hazrat Ali (R.A.A.) gave the verdict of eighty lashes and advanced the argument in favour of his verdict that the drunkard would start raving when intoxicated

and in such a state of mind would calumniate the people. Since eighty stripes as the punishment for a slanderer has already been laid down in the *Shariah*, the person who drinks should also be scourged with eighty stripes. All companions agreed on this. In other words, prohibition of wine is testified by the Holy Quran and the punishment thereof is laid down by the Sunnah, while its quantum has been prescribed by the consensus of the Prophet's companions. The drunkard drinks wine to forget his psychological suffering and to escape from the harsh realities of the world into a comfortable world of fancy.

The *Shariah* curbs this motivation by prescribing the punishment of lashes. The offender tries to escape from his psychological suffering or anguish. But the punishment of lashes shocks him back into reality. In fact it adds to his sufferings. He wants to seek refuge in the comforts of a fanciful world while the punishment of lashes does not only send him back to those sufferings but also adds to them corporal pain. It combines the torment of reality with the torment of punishment.

In other words, the *Shariah* lays down the punishment of lashes for the drunkard on the strong groundwork of psychology and tries to do away with the psychological factors at work behind crime by combating them with the opposite psychological factors in order that the latter factors might prevent human nature from committing the crime. Now if anyone desires to drink wine to forget his anguish he would at the same time be mindful of the painful punishment he might have undergone and would thus desist from committing the offence. If, however, he cannot resist the temptation of drinking, the preventive motivation would certainly get the better of criminal motivation subsequent to the infliction of the prescribed punishment and he would never drink wine again.

458. The Medical and Social Aspect of Drinking Wine.

It is established on both the medical and social grounds that consumption of wine or liquor is absolutely unprofitable. It is injurious to health and causes sterility and enervation of progeny. Besides, the use of liquor results not only in the waste of money but also in the loss of sense of decency. For this reason in a

country like Egypt use of liquor and wine should be declared unlawful. This is the more necessary inasmuch as Islam is the official religion of this country. Islam has declared drinking of wine unlawful and has laid down punishment for it. Moreover, the harmful consequences of drinking have in effect come to light. But the government has not imposed prohibition. In fact under the existing law drinking is no offence. There is no ban on the sale and purchase of wine. If a drunkard is punished at all, it is when he appears in public intoxicated. In other words, drinking and getting intoxicated is not punishable. What is amenable to punitive action is losing one's senses in public. The punishment for this, too, is very mild. It consists of a fine that does not exceed a hundred *'qursh'* or the offender is at the most awarded a few weeks' simple imprisonment.[1] The framer of the law, however, is not at fault for this, for he is a French who has simply produced a copy of the French law. The people to blame are actually those who have accepted this law and have enforced it, in spite of the fact that sections of the law in question which are repugnant to the *Shariah* are totally void. The fault lies with those individuals who treat Egypt as a part of France instead of the Islamic East. These people have absolutely forgotten the fact that there is a world of difference between the West and the East. They are poles apart in respect of their traditions, cultures, environments and legacies.

459. The World and Use of Liquor.

Islam declared use of liquor unlawful and prescribed punishment for it thirteen (rather fourteen) hundred years ago. In imposing prohibition for the so many centuries and enforcing punishment for the violation, Islam stands alone in the history of mankind. It is only in twentieth century that the world has come to acknowledge the wisdom of Islam, inasmuch as science has proved that liquor is the basic cause of evil which undermines the intellectual and mental potentials of man and ruins his health. Institutions have sprung up everywhere in the world to induce the people to give up drinking. They have brought out magazines and organized conferences for this purpose. These institutions

1. The Egyptian Penal Code, Article No.385.

particularly exercise considerable influence on the governments and people in Canada and USA[1] and consequently laws of total prohibition have been enacted in both these countries. In other countries, too, partial prohibition has been enforced, i.e. during fixed hours serving and use of wine or liquor has been banned. However, prohibition has not borne fruit in the countries where it has been imposed because no effective punishments have been prescribed there for the infringement of the law of prohibition.

Since the world has acknowledged that Islam is perfectly justified in imposing prohibition on wine, it has only to accept the Islamic punishment thereof now. When mankind once enforces this punishment all the laws of prohibition are sure to be successfully effective and the purpose of prohibition will be fulfilled.

D. PUNISHMENT OF LARCENY

460. Amputation of Hand.

The *Shariah* has laid down the punishment of amputation of hand for the offence of larceny or theft: Says Allah:

> "As for the thief, both male and female, cut off their hands. It is the reward of their own deeds, an exemplary punishment from Allah." (5:38)

The jurists are unanimous that the word 'Aidi' occurring in the Quranic verse applies to both hand and foot. If the thief commits the offence for the first time, his right hand will be cut off. If he commits it a second time his left foot will be amputated. The hand and foot both are to be cut from the ankle joints. Hazrat Ali (R.A.A.) used to cut half the foot where the lace is bound and would leave the rest for the thief to be able to walk[2].

The reason for the amputation of hand for the offence of larceny is that when the thief intends to commit theft he actually desires to add to his earning by depriving some one else of his earning. He regards his own earning as scanty and wishes to enhance it by illegitimate gains. He is not content with the wages

1. Majority of Americans have abolished the law of prohibition. But a society named Prohibition Party is still active and continues to press its demand for prohibition.
2. *Al Mughni*, Vol. 10, 264 and the sequal.

of his own labour and covets what others have legitimately earned. He does this in order to spend more, make himself conspicuous, and shirk work and thus ensure his future security. In other words, the purpose of larceny is to earn more and get richer. The *Shariah* counters this nefarious tendency by prescribing the punishment of the amputation of hand and foot, for such a punishment would naturally reduce the earning of the thief. His hand and foot which are the means of earning will be removed and thus because of the decrease in his income his wealth will dwindle whereby his ability to show himself off and spend extravagantly will be curbed. On the contrary, he will have to struggle a great deal for earning and his future will also be insecure.

In other words, the Islamic *Shariah* repels criminal motivation by deterrent psychological motivation. Suppose the criminal factors get the better, of preventive factors, the severity of punishment would stimulate the deterrent factors and the offender would desist from committing the crime again.

This then is the psychological basis on which the punishment for theft rests in the *Shariah*. It is beyond doubt that right from the creation of man, down to the present day, no better penalty has ever been prescribed for larceny and that is the reason why the *Shariah* punishment has proved to be the best and most successful. In contemporary Hijaz it is effective and has been most effective. Owing to the *Shariah* punishment for larceny Hijaz where theft, plunder, day-light robbery and chaos was the order of the day is now a heaven where peace and tranquillity reigns supreme. Prior to the enforcement of the Islamic *Shariah*, Hijaz was regarded as the worst country of the world, for the traveller was in a constant state of fear with the danger of attack on him and his dependants as well as his possessions. Even the influential people or those wielding power did not feel secure. Half the country's population consisted of thieves, robbers and highway men. But after the enforcement of Islamic *Shariah*, Hijaz is the most peaceful land in the globe. No resident or traveller in the country faces the danger of any sort. Valuable articles lie on the road-side. Nobody does so much as to touch it. The police comes and brings those articles to whomsoever they belong to.

461. Punishment of Larceny as Provided for in the Law in Force.

Under the law in force, punishment of theft is imprisonment. This punishment is ineffective in all crimes in general and in larceny in particular. The reason for this is that imprisonment does not engender in the thief's mind psychological inhibitions making him desist from stealing. For imprisonment is a punishment which simply obstructs the thief's activity and his act of acquiring something. Obviously, while in jail, he does not need to acquire anything, as his needs are fulfilled there without any effort on his part. But when he is released and is free to earn and add to his possessions whether lawfully or unlawfully, he would appear as gentleman to take the people in confidence and the people would help him in his efforts. If he succeeds in this, well and good but if his plans do not succeed he loses nothing.

But amputation of limb deprives the thief of his capacity to act and earn or at least this capacity is immensely reduced. In fact, in most cases he ceases to acquire or grab anything altogether. He can neither deceive the people nor win their confidence, since his impaired body bears testimony to his crime and his amputated hand holds up a mirror to his past. In short, in amputation the element of harm is predominant, whereas in imprisonment the element of gain outweighs the element of harm. Every human being, not to speak of the thief, is naturally inclined to do readily whatever is gainful, and shuns doing whatever is harmful.

462. Wrong Objections.

I wonder at the thinking of those who maintain that amputation of hand is contradictroy to the contemporary stage of human progress. In other words human civilization demands that we should save a thief from punishment for committing theft and allow him to go on treading the criminal path, while living ourselves in a constant state of fear; or rather we should toil so that idlers and thieves might steal the fruits of our labour.

I wonder if civilization means to reject logic and science, ignore human nature, long experiences of peoples throw our reason into disuse and to avoid acting on the conclusions drawn by

careful thought simply because someone has made a groundless assertion.

If such an appropriate punishment could be awarded as is in harmony with humanity and civilization then imprisonment ought to be replaced by amputation of hand, for the latter is devised on the strong and cogent basis of psychology, human nature, experience of pain, and logic, and this is the very basis of human civilization. The punishment of imprisonment on the contrary, has no scientific or logical foundation, nor is it in harmony with the nature of things.

The punishment of amputation is rooted in human psychology and is the outcome of a profound study of human nature. Hence it is suited to the individuals and also beneficial for the society, for it causes decline in the incidence of crime and contributes to maintenance of peace and tranquillity in the community. Obviously there can be no better punishment than the one which is in the interest of both the individual and the community.

But some people hold that this is no justification for the punitive amputation of hand, inasmuch as it is cruel or brutal. This is the only argument these people advance in support of their aversion to amputation. But it is absurd and carries no weight at all, for a punishment characterized by mildness and leniency is no punishment at all. It is of no avail and nothing more than mere play. Cruelty is the very essence of punishment.

I would like to pose a question to the compassionate people. The law in force provides rigorous life imprisonment in certain cases of larceny and in certain other rigorous imprisonment for fixed periods. How do they bear the miserable plight of the offender who is deprived of his freedom, and confined in the jail far removed from his family like an encaged bird or a corpse lying in the grave? Let them tell us which of the two punishments is more cruel: amputation of the thief's hand and his subsequent freedom to live with his family or imprisonment involving denial of freedom, loss of decency and human qualities and thwarting of masculine potency?

Again, these compassionate people lose sight of the fact that the law in force also provides for death penalty, which results in the loss of life and decomposition of body. On the contrary in

the punitive amputation of hand only a part of the body is dismembered and lost. These people agree to death penalty but oppose amputation of hand which is partial punishment. Why should those who do not treat death penalty as horrible, deem punitive amputation so ghastly?

Thus if the Islamic *Shariah* has prescribed the punitive amputation of hand, there is nothing brutal about it. In fact *Shariah* is the only law in the world that is totally devoid of brutality. Whatever has been construed as brutal in the *Shariah* is actually its strength and positively. This is a feature of not only its punishment but also in its beliefs, forms of worship and rights and duties. Otherwise the words most frequently occur in the Holy Quran are synonymous with mercy and compassion. The *Shariah* makes it obligatory for every Muslim to begin every act with the name of Allah the Merciful including the acts of eating, drinking, worshipping, sitting, standing, sleeping and waking. He is also expected to have the impression of Allan's mercy in his word and deed by mentioning His mercy. The Prophet (S.A.W.) has said:

"Allah has mercy on those who have pity (on others)."

Again, says the Holy Prophet (S.A.W.):

"Have pity on the inhabitants of the earth and Allah will have mercy on you."

In short, mercy is the origin of the *Shariah.* The question of brutality in it does not arise at all.

E. PUNISHMENT OF BLOODSHED

463. Punishment of Blood-guilty.

The *Shariah* has laid down four punishments for shedding blood:

1. Killing.
2. Exacution and gallows.
3. Amputation.
4. Banishment.

The source of all the above four punishments is the following verse of the Holy Quran:

"The only reward of those who make war upon Allah and His messenger and strive after corruption in the land will be that they will be killed or crucified, or have their hands and their feet on alternate sides cut off or will be expelled out of the land. Such will be their degradation in the world and in the Hereafter theirs will be an awful doom."

(5:33)

464. Killing

If a plunderer kills his victim, he is liable to be killed. This punitive killing is a *had* and not *qisas* because it is not nullified by the remission of the guardian or heir of the victim. This punishment, too, has been prescribed on the basis of the knowledge of human nature. The killer is induced to kill by the will to survive and he murders his victim in order to live himself. But when he comes to know that killing his victim entails killing of himself, he would desist from committing murder. In other words, the *Shariah* provision for punitive killing is designed to repulse the homicidal motivation by bringing into play the opposite psychological factors that can deter commission of the offence by making the killer inevitably realize that commitment of murder by him would, of necessity, result in his own murder.

465. Killing and Hanging.

If the plunderer commits murder as well as robbery, he shall be liable to killing and hanging for the offences of both homicide and robbery, or for the two offences combined or for an offence committed for the sake of another offence, i.e. murder is committed for the sake of gaining something valuable. This punishment also constitutes *had* because it is not invalidated by remission on the part of the lawful guardian of the victim. The punishment in question, too, has been prescribed on the same basis as punitive killing. But since in this case commission of homicide is motivated by the desire to grab property, harsher punishment would be awarded so that the offender might desist from committing the two-fold offence when he ponders the severity of punishment involved.

Some jurists opine that the punishment of hanging will

precede slaying. In other words, the offender will be hanged alive and slain after having been hanged. This group of jurists argues that hanging is punishment which can be inflicted on a living person and not on the dead. Other jurists are of the view that the offender will be slain or killed first and then hanged. The argument they advance in support of their position is that in the Quranic decree the word meaning killing or slaying occurs before hanging and, therefore, killing must precede hanging. They further contend that hanging before killing is tormentation which is forbidden by the Shariah. Besides, the punishment of hanging does not prevent the attempt to murder, for had it been so, there would have been no need in the Shariah for the provision enjoining killing. This group of jurists holds that hanging is designed to warn others by publicity so that they may abstain from the commission of the twofold offence.[1] The position first mentioned is taken by Imam Malik and Imam Abu Hanifa, while second opinion is held by Imam *Shafi'ee* and Imam Ahmed.

The twin punishment of hanging coupled with killing bears close affinity to the modern form of shooting a condemned offender by fastening him to a cross-like board.

The jurists differ on the question of keeping the executed offender hanging for quite some time. Some of them fix three days; others hold that he ought to remain hanging till his body begins to stink and as soon as it emits offensive smell the corpse should be removed. There are still others who deem hanging adequate punishment and no sooner the purpose of hanging is fulfilled than the dead-body should be brought down. There is, however, a number of other jurists who think differently. They opine that the corpse ought to be left hanging until the news of the infliction of punishment is spread far and wide, but it should be taken down before it begins to stink.[2]

One of the merits of the Islamic *Shariah* is that it draws a line of distinction between the punishment of homicide and that of grabbing goods along with homicide, since the two offences are different and there is no parity between them. Reason, therefore,

1 *Al-Mughni,* Vol.10, P.308.
2 *Al-Mughni* Vol.10. P.308.

demands that the punishment of the one should be different from that of the other.

It may well be argued that any punishment coupled with capital punishment is useless. Hanging, in particular, is of no use other than terrification. The answer to this question is that every punishment has two sides of it. On the one hand it chastises the criminal and on the other it serves as warning to the non-criminals. No doubt every punishment after execution is of no avail, but even a trivial penalty coupled with execution does have utility of its own inasmuch as it serves as a deterrent and warning. Hanging does not produce any effect on the condemned man particularly when it is carried out after killing the man. But this event has immense impact on the masses. It rather produces the desired effect on common people in general and the plunderers in particular. In short, the punishment of hanging has undeniable potential of warning the non-criminals and preventing them from committing the crime.

466. Amputation.

If the plunderer robs the victim of his goods but does not kill him, he is liable to amputation which means chopping off his right hand and left foot simultaneously.[1] The *raison d'etre* of this punishment is the same as that of larceny. But since plunder is committed on roads far removed from population, the plunderer is often sure of his success and does not face the danger of being encountered. This is the factor which reinforces the psychological factors at work behind criminal motivation and curbs the preventive psychological factors originating from the punishment of minor case of theft. It is for this reason that severe punishment has been prescribed for robbery so that the preventive psychological motivation might get the better criminal motivation.

The punishment of highway-man or way layer is equal to that of a thief who commits larceny twice. This no doubt is a fair punishment, because a highway man is as dangerous as a thief who is guilty of stealing twice. Besides, the chances of escape open to such a robber are greater than those of an ordinary thief.

As opposed to the *Shariah* which prescribes for a highway man double the quantum of punishment laid down for an ordinary

1. *Al-Mughni,* Vol. 10, P.308.

thief, the Egyptian law provides for five times as much punishment for highway robber as for an offence of ordinary theft. Thus under the Egyptian law theft is punishable for three years' imprisonment while highway robbery is punishable by rigorous imprisonment for life or imprisonment for a fixed period extending to fifteen years. This is five times as much as the punishment of an ordinary thief. But it has been observed that nearly fifty per cent of the highway-men or bandits sentenced to rigorous imprisonment, commit new crimes the same year they are released. When they are released from the prison, their desire to commit crimes is intensified and, moreover, they come out as skilful criminals. When they enter the social life again they pose a serious threat to peace and tranquillity. This is a fact admitted by all. But can anybody imagine that a man with amputated limbs would commit theft or robbery again or would benefit from his skill in committing the crime and his presence would pose a threat to the peace and tranquillity of the society?

467. Banishment.

This punishment is intended for a highway-man when he creates terror on the roads but does not commit murder or robbery.

The reason for such a punishment is that the robber who simply causes terror without robbing or committing murder actually wants his robbery to be famous. He is to be punished by expulsion from the land in order to throw him into oblivion and obscurity. Another possible reason is that since the highway man terrorizes wayfarers and causes breach of peace, he is to be banished and deprived of peaceful life.

Whatever the reason, the *Shariah* curbs the criminal motivation by preventive motivation. Now, if the highway-man thinks of spreading terror for celebrity, he will at the same time think of the total obscurity resulting from the punishment of his offence. When he considers to terrorize the people and cause breach of peace, he would also think of his own expulsion and consequent deprivation of peace anywhere. This ideational process would result in the domination of preventive factors over the perpetral criminal motivation. Thus the *Shariah* punishment in question is grounded in human psychology.

The view to be preferred in this connection is that the offender is to be banished to the nearest town[1] within Darul Islam (Islamic state)[2] and to be imprisoned in that town. The term of imprisonment has not been fixed. The sentence will be served by him as long as he does not repent and is not reclaimed. On repentance he should be released. Those who hold this position argue that by sentencing the offender to imprisonment the purpose of punishment is served; for if he is banished from one town to another and left free there, the purpose is not fulfilled, inasmuch as the highway man will resume robbery in that town also if he is left free there. Hence banishment must be coupled with imprisonment.[3]

The punishment of banishment as explained above is similar to that of committing a convict to a reformatory under the law in force. According to this law the convict is confined within a certain place for an unlimited period on condition that the term of confinement should not exceed that which is determined in the law. This kind of punishment is actually the application of the doctrine of punishment for unlimited period which is the latest concept in the modern laws.

The doctrine of unlimited punishment was introduced in the modern laws only towards the end and in the beginning of the nineteenth and twentieth centuries whereas the Islamic *Shariah* had enforced this doctrine Thirteen Hundred years ago. The proof of this is the punishment of banishment discussed above. If anybody claims that the doctrine in question stemmed from the modem operative laws, he should know that it is the same old Islamic concept which has been adopted in the modern laws. And whoever thinks that the *Shariah* punishment and concepts are out of time with the modern age, should know from what has been stated above and from what is to be discussed in the sequel that the *Shariah* punishments are quite in harmony with the modern era.

1. Some jurists hold that he should be banished from Darul Islam to Darul Harb (non Islamic territory) but this is incorrect.
2. The distance of nearest town is a day's journey with moderate pace; as is the position of *Imam Malik, Shafi'ee* and *Ahmed,* but according to *Imam, Abu Hanifa,* it is three days' journey while some other jurists fix seventeen miles.
3. *Sharh Al Zurqani,* Vol. 8, P. 110; *Hidayat-ul-Mujtahid.* Vol. 2, p. 381; *Asna-ul-Matalib,* Vol. 4, P, 154;*Al-Mughni* Vol.10, P.313.

F. PUNISHMENT OF APOSTASY AND REBELLION

468. Punishment of Apostasy

There are two punishments of apostasy: the one is primary punishment which is death penalty and the other is subsidiary which is the confiscation of property.

(1). **Death Penalty**. The Shariah prescribes capital punishment for apostasy. The argument advanced in the Holy Quran in this context is this:

> "And whoso becometh a renegade and dieth in his disbelief, such are they whose works have fallen both in world and the Hereafter. Such are rightful owners of the Fire: They will therein." (2:217)

Besides, the Holy Prophet (S.A.W.) enjoins:

"Whoever changes his religion, kill him."

Apostasy in the Shariah means abandoning the Islamic faith after embracing it. In this sense only a Muslim can be guilty of apostasy.

The *raison d'etre* of capital punishment for apostasy in the *Shariah* is that apostasy is repugnant to the faith of Islam on which the Islamic society is founded. If this offence is taken lightly, the collective system of Islam may collapse. The severe punishment laid down for it aims at the total elimination of apostasy on the one hand and warning and preventing others from committing it. Obviously, capital punishment serves as a more effective deterrent than any other punishment. Whatever the factors inciting commitment of the offence, capital punishment stirs up the preventive factors in the human psyche and a man refrains as often as not from committing the offence.

Most of the modern laws in operation ensure security of the social system by prescribing harshest punishment for those who violate and destroy the system. The first of such punishments is death penalty. In other words, modern laws lay down the same punishment for causing disorder, safe guarding the social system as does the Islamic *Shariah*.

Confiscation of Property

Subsidiary punishment for apostasy is confiscation of property. However, the jurists differ on this question. According to Imam Malik and Imam Shafi'ee and the dominant position taken by the Hanbalites, the entire property of the renegade should be confiscated. On the contrary, Imam Abu Hanifa and some of the Maliki school hold the view that only that portion of the renegade's property is to be confiscated which he may have acquired after turning an apostate. Property acquired by him prior to renunciation of Islam belong to the heirs of the renegade. However, according to another view attributed to Imam Ahmed, property acquired after apostisation will not be taken over provided that the heirs of the offender believing in the religion (or for that matter any atheistic system) to which the apostate changes over exist. But this tradition is of incomplete chain.[1]

469. Punishment of Rebellion

The *Shariah* has laid down capital punishment for rebellion. The basis of this punishment is the following divine decree:

> "And if two parties of believers fall to fighting, then make peace between them. And if one party of them doeth wrong to the other, fight ye that which doeth wrong till it return unto the ordinance of Allah." (49:9)

Besides, the edict of the Holy Prophet (S.A.W.) in this regard is as follows:

> "Whoever makes commitment of allegiance to his Imam is under the obligation to obey him as far as possible. If anyone tries to wrest the leadership of his Imam, behead him."

Again, says the Holy Prophet (S.A.W.):

"Such and such offence will be committed. Listen, If my Ummah is united and then some one rises against it, behead him, whoever he may be."

The target of the offence of rebellion is the governmental set up and the rulers. The *Shariah* adopts a strict attitude in this respect, because leniency would result in disruption and disorder,

1. *Al-Mughni.* Vol. 7. P.174.

resulting finally in the disintegration of the social system. No doubt execution is the most effective measure against rebellion, for the motive of this offence is greed and lust for power.[1]

All the countries of the world today award capital punishment for rebellion. This is the very punishment prescribed by the *Shariah* for the same offence.

SECTION II

PUNISHMENTS PRESCRIBED FOR QISAS AND DIYAT CRIMES

470. Various Punishments

As has already been stated, the crimes involving qisas (retaliation) and *diyat* (blood money) are as under:

(1) Intentional or Felonious Homicide.
(2) Quasi Intentional Murder
(3) Unintentional Homicide.
(4) Intentional Infliction of Wound and
(5) Unintentional Infliction of Wound.

The punishments laid down for the above crimes are as follows:

471. Qisas

The Islamic *Shariah* has prescribed *qisas* or retaliation as the punishment for intentional homicide and wound caused intentionally. The meaning of *qisas* is that the offender is to be awarded punishment identical with his offence: he would be killed or wounded in the same way as he kills or wounds his victim. The punishment of *qisas* owes its origin to the Quran and Sunnah. Says Allah:

"O ye who believe! Retaliation is prescribed for you in the matter of the murdered; the freeman for the freeman, and the slave for the slave, and the female for the female. And for him who is forgiven somewhat by his (injured) brother, prosecution

1 If the rebel is apprehended and imprisoned, his execution is Unwarrantable, except, of course, he may have killed some one during rebellion.

according to usage and payment unto him in kindness. This is an alleviation and a mercy from your Lord. He who transgresseth after this will have a painful doom.

And there is life for you in retaliation, O men of understanding, that ye may ward off (evil)." (2:178-179)

This is another divine decree in respect to *qisas*:

"And We prescribed for them therein: The life for the life, and the eye for the eye and the nose for the nose and the ear for the ear, and the tooth for the tooth and for wounds retaliation. But whoso forgoeth it (in the way of charity) it shall be expiation for him. Whoso judgeth not by that which Allah hath revealed, such are wrong-doers." (5:45)

The divine decree is substantiated by the edicts of the Holy Prophet (S.A.W.):

"Whoever murders a believer without any reason, he shall be killed in retaliation thereof, unless the victim's lawful heirs forgive him."

Again,

"Whoever is murdered, the members of his or her family have the choice either to retaliate or accept blood-money."

No punishment better than *qisas* has ever been prescribed in antiquity or in modern times. Can there be a more just punishment than that which is identical with the criminal act? It is also the best punishment for ensuring collective peace and security, for if the offender is sure that he would be punished in accordance with this offence, he would generally abstain from committing the offence.

It is the offender's will to struggle for existence and the desire to dominate which incites him to commit murder or cause injury. Now if the offender is dead sure that he cannot save himself by killing his victim, he will refrain from taking his life in order to preserve himself. Besides, if he is certain that the person whom he overcomes by his criminal act today will retaliate by lawful means tomorrow, he will not make such a criminal attempt. We observe instances of this in everyday life. For example, when a habitual wrong-doer finds that his opponent is stronger than he and is sure to return excess for excess, he would cool down and refrain from committing any transgression and doing

any thing that may lead to a clash. Similarly an armed person would desist from committing any excess when he finds that his opponent too is armed and able to retaliate. Similarly wrestlers and boxers never challenge for a bout to stronger opponents, but they never hesitate to challenge opponents whom they believe to be weaker. This is characteristic of human nature and the *Shariah* has prescribed its punishment of *qisas* on the human nature. Thus the opposite motive originating from the punishment of qisas curbs criminal motivation and prevents the commitment of offence. This is in harmony with modern psychology also.

Although the modern laws in operation do acknowledge the qisas punishment, yet they apply it to the offence of homicide only to the exclusion of the infliction of wounds. The offender guilty of wounding is only fined or imprisoned or is awarded both these punishments. No doubt, the *Shariah* has taken a more logical position in placing at par homicide and injury in the determination of punishment thereof. The modernists, on the contrary, draw a line of distinction between the nature of homicide and injury and have thus grossly deviated from the nature of things. The reason for the treatment of homicide and injury at par by the *Shariah* is that both the offences belong to the same category and the same motive is at work behind their occurrence. In most cases injury precedes homicide. What actually happens is that death results from some wounds and injuries while some wounds heal up and the injured person recovers. In such a case the offence is known as causing wound or injury, while in the case of death, the offence of homicide takes place. When we see that both the offences belong to the same class then the kind of punishment for both should be the same as well. However, since the consequence of one offence is different from the other, the quantum of punishment should also differ and then the quantum so determined should not be increased or decreased. In short, both the offences are of identical nature and their origin is the same, i.e. wound. Hence the nature of their punishment is identical i.e. qisas or retaliation. The only difference is that one crime culminates in homicide and the offender is consequently sentenced to death and the other crime culminates in wounding the victim for which the offender himself is liable to the infliction of wound

to the same extent. This is the logical subtlety and technical delicacy of the *Shariah,* which still remains out of the reach of the modern law. It is certainly going to incorporate this fine, delicate and logical aspect of the *Shariah* by-and-by, for the springs of all the laws of the world lie in logic and as the man-made laws acknowledge the punishment of retaliation and apply it to homicide, and as logic demands that it should also be applied to the offence of injury, the modern laws may adopt *qisas,* at any stage, inasmuch as they have already incorporated its preliminaries and causes.

In retaliatory punishment, the victim and his lawful heir have the right to forgive the offender. Hence if they do forgive, the punishment of *qisas* would stand invalidated. This remission may either be without compensation or involve blood-money. But pardoning or remission does not mean that the person in authority cannot award appropriate penal punishment.

As a rule, the Shariah does not allow the victim the right to forgive the offender in the case of punishment for general offences. But in the case of offences involving *qisas* and *diyat* (blood-money) such right has been provided for as an exception, for these offences are intensely related to the person of the victim and have far greater bearing on him than on collective security and tranquillity. The *Shariah* sees no danger to peace and tranquillity by pardoning on the part of the victim or his lawful heir, for the offences of killing and wounding do not pose a threat to collective peace and tranquillity to the extent that they are dangerous to the individual. The reason is that everybody is frightened by the murder or injury to a man with whom he has nothing to do, nor does everybody fears that if such and such person has been wronged, he too will be wronged, for the offences of homicide and causing wound and injury are committed with purely personal motives; whereas everybody fears a thief because he knows that the thief does not need the goods of any particular person, but simply needs goods wherever he can get it.

Even if we admit that owing to the power conferred on the victim or his lawful heirs to forgive, the offender is likely to adversely affect the public peace, such a situation may arise when the power so conferred is exercised excessively. But this is

most unlikely because sanguinary offence in itself is of personal nature associated with the victim and it demands severe action rather than remission. The actual urge to take vengeance is stronger than the urge to forgive the offender. In other words, the strong relationship of the offence with the victim is a guarantee against the excessive use of the right to forgive, and this is the fact which ensures that remission by the victim will have no impact on the public peace.

In allowing the victim the right to forgive, the *Shariah* has taken a logical position, for punishment is primarily designed to eradicate crime, but in most cases punishment does not impede the incidence of crime, whereas remission as often as not serves as a deterrent thereto. The offender is pardoned only when the parties are reconciled, the minds are purged of animosity and the criminal motivation peters out. Thus pardon virtually plays the role of punishment and succeeds in achieving the result which punishment fails to achieve. Looked at logically, it may well be said that the offences of homicide and infliction of injury are offences of personal nature, whose springs lie in the victim's person and whose motivation too are personal. Besides, these offences have much greater impact on the life and person of the victim than on the public peace. Hence owing to the close relationship between the victim's person and the crime, it is the right of the victim to be taken into consideration in awarding the punishment.

Just as the *Shariah* has given the victim the right to pardon the offender, so also do the modern laws acknowledge the right in, question, although these laws do not apply this principle to those offences to which the *Shariah* extends. For instance, the modern laws acknowledge the right of the husband to his wife guilty of adultery. Hence if the *Shariah* has allowed the victim the right of remission, there is nothing novel about it. This principle has been accepted in the modern laws also. However, the *Shariah* stands out in this respect vis-a-vis the modern laws in choosing the most appropriate object for its application; for grant of the right to pardon in homicide and injury would result in mutual affection and harmony and motives of revenge would be dissipated. Consequently the incidence and virulence of crime would decline.

On the contrary, the modern law has chosen extremely wrong and inappropriate occasion for the application of the above principle. In the case of adultery the right to pardon would result in the dissemination of evil and corruption and the disintegration of the family system. The modern law has allowed this right with a view to restore harmony between man and wife for the time being. But if the family breaks up, an important pillar of the social edifice would collapse, whereas law is not meant to disintegrate the society. It is, on the contrary, designed to strengthen and sustain the social order.

Since *qisas* is the punishment of felonious homicide and wilful infliction of injury, its sentence can be passed only if it is possible to carry out the sentence and the conditions thereof could be fulfilled. If there is no possibility of enforcing *qisas* and fulfilling the conditions prescribed for it, then the sentence of *qisas* would be invalid and would be replaced by blood-money, even if the victim or his guardian does not demand blood-money, because *diyat* or blood-money is one of those punishments whose enforcement does not depend on the demand of the individuals.

There is nothing in the *Shariah* that stands in the way of awarding *ta'zeer* punishment to the offender in the interest of public good in case if there is no possibility of putting into effect the sentence of qisas. As a matter of fact, Imam Malik regards the *ta'zeer* as essential in every case of homicide and injury wherein *qisas* stands invalidated or its sentence cannot be translated into action.[1]

At any rate, qisas is the basic punishment in the case of felonious homicide and wilful infliction of wound and blood. Money and *ta'zeer* are alternate penalties, which replace *qisas* when it is inhibited or stands invalidated as the result of remission.

472. Diyat or Price of Blood.

Diyat has been prescribed by the *Shariah* as the basic or substantive punishment for quasi-intentional and inadvertent homicide or infliction of wound. The source of this punishment is also the Holy Quran and Sunnah Says Allah:

1. *Mawahib-ul-Jaleel,* Vol. 6, P.268.

"It is not for a believer to kill a believer unless (it be) by mistake. He who hath killed a believer by mistake must set free a believing slave and pay the blood-money to the family of the slain, unless they remit it as a charity." (4:92)

The Prophet (S.A.W.)'s verdict in this connection is as follow:

"Whoever is killed inadvertently as by flogging or beating with a stick or being hit by a stone, his blood-price is a hundred camels."

Diyat is the fixed blood-price which is taken from the offender and given to the victim or his lawful guardian. Although this price is received as a punishment, it is never deposited in the state treasury, but becomes the property or asset of the victim. Looked at thus, it is somewhat similar to compensation. It is for this reason that it varies according to the extent of injury and if the commitment thereof is intentionally or inadvertently. But in spite of this close affinity it will be wrong to regard *diyat* as identical with compensation. It is in reality a criminal punishment, the sentence whereof does not depend on the demand of individuals. Thus it constitutes the property of the victim side by side with being a punishment or rather it is both the property of the victim and a punishment. It is punishment because it has been prescribed in lieu of an offence. If the victim forgives the offender, the latter can be awarded an appropriate *ta'zeer* punishment. Had it not been a punishment, the sentence thereof would have hinged on the claim of the victim and no *ta'zeer* punishment would have taken its place in the case of its remission by the victim. It is a compensation because it is purely the property of the victim and if he forgoes it, he will not be within his right to give a verdict.

Diyat is a punishment having a single limit and the court can neither enhance or diminish it. *Diyat* for a quasi-intentional offence is different from that intended for unintentional offence. It is, moreover, different according as the nature and extent of injury varies. Thus there is no difference between the *diyat* of a child and an adult, the weak and the strong, the low-brows and the high-brows, the ruler and the ruled. However, as regards female, all the jurists agree that her *diyat* is half of a male. In the

case of wounds, Imam Shafi'ee[1] and Imam Abu Hanifa hold that the female's *diyat* is half of the male's, whereas according t Imam Malik and Imam Ahmad[2] the *diyats* of male and female is equal, to the extent of one third; but, however, in case the *diyat* increase, the female's blood price would be half of male's.[3] The jurists differ on the quantity of non-Muslim's *diyat*. Some jurists hold the *diyat* of a Muslim and non-Muslim to be equal. Others differentiate between them.[4]

The *Shariah* draws a line of distinction between intentional or felonious homicide and quasi-intentional homicide. It prescribes qisas for the former and heavy *diyat* for case of felonious murder, but does not do so in the case of quasi-felonious murder. The difference between the two homicidal acts inhibits punitive equality in the two distinct cases of homicide. Besides, the punishment of *qisas* cannot be applied to quasi-intentional homicide, for qisas requires complete consistency of the criminal act with the punishment thereof. But as to quasi-intentional homicide, the victim is not murdered intentionally whereas the offender cannot be put to death without intention. Thus the punishment does not correspond to the crime. Hence justice and logic both demand that the punishment for intentional homicide should be distinguished from the punishment for quasi-intentional homicide.

The Shariah also differentiates between purely intentional and purely inadvertent offences. Thus the punishment prescribed for the former is *qisas* and that prescribed for the latter light offence *diyat*. In this distinction it has been kept in view that the offender commits intentional offence wilfully. He thinks over it and procures the requisite means to commit so that he may achieve something substantial or intrinsic for himself. On the contrary, the offender does not commit inadvertent offence wilfully. He neither considers it, nor has he any motive to commit it. In such

1. *Bada'e-wal-Sana'e,* Vol.7, P. 312;*Nihayat-ul-Muhtaj,* Vol.7, P. 302.
2. *Sharh-ul-Durdeer,* Vol.4, p. 248, *Al Mughni.* Vol.9, P.523.
3. With Imam Ahmed this rule is unconditional, but Imam Malik imposes the condition of the unity of action and unity of occasion (ii) See *Sharh-ul-Durdeer,* Vol.4, P.249; Mawahib-ul-Jaleel, Vol.6, PP.264-265.
4. *Bada'e-wal-Sana'e,* Vol. 7, P. 255; *Sharh-ul-Durdeer,* Vol. 4, P. 238; *Al Mughni,* Vol. 9, P. 567; *Al-Muhazzab,* Vol.2, P.211.

an offence, the criminal act takes places simply due to the neglect or carelessness of the offender. His mind is completely inattentive to the guilt. It follows then that there are two ingredients that go to make up an intentional crime: the one is subjective and the other is material. The subjective of psychological element consists of the offender's attention to the offence and material element is the actual criminal deed. As opposed to this, an inadvertent offence constitutes only the criminal to the exclusion of psychological expedient. On this ground the inadvertent offence is not identical with a wilful offence. This is the psychological difference between voluntary offender and an erring offender, which has led to differentiation between the two sorts of crimes. The psychological difference between the two kinds of offenders has exactly been taken into consideration in the determination of their punishments, for if the voluntary offender is divested of the psychological factors at work behind his offence, he will be at par with the offender committing the offence inadvertently, and only the material element would remain in his offence. It is for this reason that the punishment of intentional crime when remitted has been treated in the *Shariah* as equivalent to that of the offence committed by mistake, and has in either case prescribed blood-price. In other words, in the case of intentional offence, remission is related to the subjective element of the offence. If *diyat* is also remitted, then the two sorts of offences would be inter-related by only their material ingredients.

The Shariah does not prescribe the punishment of qisas for a sanguinary offence committed unintentionally, for in such an offence the psychological motives are absent. In this case the offender does not intend to commit the offence nor does he contemplate such an act. But since the offence comes about because of his negligence and carelessness and since such an offence results in pecuniary or material loss to the victim or his lawful heirs, the *Shariah* prescribes a punishment for it on both the grounds, which a man cherishes more than anything with the exception of life, i.e. property or something valuable. In other words, the punishment for negligence is the property which the people desire to possess and try to acquire and punishment for

damaging the property of others also is to be undergone by compensating with property. It is beyond doubt that this punishment is enough to warn careless persons and induce them to be careful.

We learn from what has been stated above that *diyat* is the common punishment for the intentional offence which does not involve *qisas,* the quasi-intentional offence and the offence committed inadvertently. But the quantum of *diyat* varies in these three cases. For the first two offences, the punishment is heavy *diyat,* while in the unintentional offence it is light *diyat.*

Diyat, as a rule, consists of a hundred camels. The difference between heavy and light *diyat* is not that of number but the kinds and ages of the camels.

Thus, generally speaking, *diyat* means a hundred camels and this is known as complete *diyat*; whether it is heavy or light. The blood price less than complete *diyat* is termed as *'arsh'.*

Thus we speak of arsh for hand and *arsh* for leg. But in the common usage *diyat* is meant by *arsh* as well.

There are two kinds of *arsh.* The fixed *arsh* and the Un-fixed *arsh.* Fixed *arsh* is that the quantity whereof has been determined by the law-giver, for instance so much *arsh* for finger and so much for a hand. Unfixed arsh is that, the quantity whereof has not been prescribed in the Holy Quran or Sunnah, and whose amount depends on the discretion of the court. This unfixed arsh is also known as the ruling of the government or the fair judgement.

What is subject to diyat?

As a rule *diyat* is imposed on the goods or property of the offender, whether it is *diyat* for life or what is less than life. But Imam Malik exempts the *arsh* for those injuries which involve the loss of the offender's life and on grounds whereof *qisas* is prohibited; for instance, the dismemberment of the thigh or abdominal injury. In such a case Imam Malik gives the verdict that one third of the blood price will be paid by the family of the offender, provided that the offence involved is not proved by confession.[1]

1. *Sharh-ul-Durdeer,* Vol.3, P. 50; *Bada'e-wal-Sana'e,* Vol.7, P. *255; Al Mughni* Vol.9, P. *488;Al Muhazzab,* Vol.2, P.210.

Imposition of diyat in case of offending child or lunatic.

The jurists differ on this question. According to Imam Malik, Abu Hanifa and Ahmed, *diyat* is obligatory for a delinquent child or lunatic and shall be paid by his family, even if the offence is committed intentionally, for in the opinion of these authorities, the intentional offence of the child or lunatic is actually inadvertent offence. The reason is that intention in such a case is no volition worth the name. Hence intention will be conjoined with inadvertence.[1] The school of Imam Shafi'ee, however, holds two opinions in this regard. One which is preferred to the other is the same as the above, while according to the other opinion the intention of a child[2] and lunatic will be treated as intention only; for although *qisas* is not enforced for the intentional homicide committed by them, their corrective chastisement is legitimate. Hence their intention would be tantamount to the intention of a sensible adult, and their property will be subject to the payment of blood-price.

The jurists also differ[3] on the question of quasi-intentional sanguinary offence and unintentional offence of this nature. Imam Malik holds that one third of the *diyat* payable by the offender will be borne by the members of his family while the payment of the remaining two thirds will be incumbent on the offender.[4] According to Imam Ahmed, the offender will pay less than one third of the amount of complete *diyat,* while his family members will pay up to one third or more.[5] Imam Abu Hanifa holds that the offender will pay less than half of one tenth of the *diyat* due and whatever is in excess of this will be paid by the family members of the offender.[6] Imam Shafi'ee's position on the other hand is that whatever the amount of *diyat,* it will be borne by the offender's family in its entirety. He argues that whoever is subject

1. *Sharh-ul-Durdeer,* Vol. 4, P.210; *Al-Bahrul Raiq,* Vol. 8, P. 341; *Al Mughni;* Vol. 9, P.504.
2. *Al Muhazzab.* Vol.2, P.210.
3. It may be noted that Imam Malik does not acknowledge quasi-intention homicide or injury. According to him an offence is either intentional or unintentional. There is no intermediate offence between the two.
4. *Mawahib-ul Jaleel.* Vol. 6, P.265.
5. *Al Mughni,* Vol.9, PP.505-506.
6. *Bada'e-wal-Sana'e,* Vol. 7, P.255.

to the payment of more of the prescribed amount of complete *diyat*, is the more liable to the payment of less amount thereof.[1]

If the payment of *diyat* becomes obligatory for *'Aaqila* (the members of family), then according to Imam Malik and Imam Abu Hanifa the offender will bear the amount of *diyat* as much as any one individual of the *'Aaqila* (family) is subject to. Imam Shafi'ee and Imam Ahmed, however, hold that when *diyat* becomes obligatory for the family, the offender is not under obligation to pay it.

As a technical term of jurisprudence *'Al 'Aqila'* applies to those people who can bear the burden of *diyat,* for *diyat* is a term exchangeable for *'Aql* inasmuch as it silences the lawful guardian of the murdered person or as such people save or protect the killer. Therefore, *'Aql* in this context means protection.

The *'Aaqila* of the killer are his paternal relatives. The term excludes maternal relations, husbands and other relations who are not paternal.

Paternal relations include all the kinsmen and relations on the father's side, however remote they may be, for if nearest relations do not exist then remote ones will be the lawful guardians. There is no condition here that they will be provisional heirs, but any relative who become heirs after the elimination of *'hujb'* (deprivation from inheritance) fall under the head of *'aaqila.*

Such relations, nevertheless, will not be treated under the obligation to pay in compensation such property or assets, whose payment becomes a burden upon them, for *diyat* is imposed upon the *'aaqila* for no fault of their own and as a help and compassion for the offender. Thus the burden of *diyat* on offender will not be reduced to wrong or oppress the non-offender. Had such an oppressive price been warrantable, it would have been tantamount to the wages of the offender's crime and to a reward for his evil deed. It such a thing is unwarrantable for the offender, how could it have been warrantable for the non-offender?

There is a difference of opinion among the jurists as to the amount of *diyat* to be borne by each individual. Imam Ahmed is

1 *Al-Muhazzab,* Vol. 2, P.227.

of the view that this depends on the discretion of the judge who will fix the amount taking into consideration as to how much amount an individual can easily pay. The school of Imam Malik also holds that one *dinar* should be imposed on each individual while the school of Imam Ahmed also opines that a well-to-do person should be required to pay half a *mithqal* and an individual belonging to middle class one fourth of a *mithqal*. This is also the view of Imam *Shafi'ee*. Imam Abu Hanifa, on the other hand, says that no individual will be charged more than three or four *dirhams* and there will be no discrimination between the well-to-do and one with moderate income.[1]

No *diyat* is obligatory for a destitute woman, child and mentally deranged person, for imposition of *diyat* on a destitute would be an excess. A woman, child and lunatic have no support. However, if these are guilty of an offence, *diyat* will be recoverable from them.

There are two opinions in case the offender has no *'aaqila* or he is a destitute or the number of his family members is so small that they cannot bear the burden of the whole *diyat:* The first opinion is that the public exchequer will take the place of *'aaqila.* If there is no *'aaqila* at all or there is one but the person concerned is penniless, then all the *diyat* due from him will be paid by the public exchequer. If the number of the family members is small and cannot pay the whole *diyat,* the balance will be paid by the exchequer. This is the opinion held by the schools of Imam Malik and Imam Shafi'ee. The apparent position of the Hanafites and the Haanbalites is also the same. The second opinion is that *diyat* will be recoverable from the assets or property of the killer, for in reality the killer alone is responsible for the payment of *diyat.* The family bears the burden simply by way of helping him. Hence if there is no family, the obligation of the payment of *diyat* would revert to the origin. This opinion has been quoted by Imam Muhammad with reference to Imam Abu Hanifa.[2] Some of the Hanbalites also subscribe to this view.

1. *Bada'e-wal.Sana'e,* Vol. 7, P. 256; *Al Mughni,* Vol. 9, P.520; *Mawahib ul Jaleel,* Vol.6, P. 267; *Al Muhazzub,* Vol.2, P.230.
2. *Mawahib-ul-Jaleel,* Vol. 6, P. 266; *Bada'e-wal-Sana'e.* Vol. 1 p. 256: *Al Mughni.* Vol.9, P. 524; *Al Muhazzab,* Vol. 2, P.228.

The Reason for the Family Bearing the Burden of Diyat.

Bearing the burden of *diyat* by the family would mean that those who are not guilty are to bear the brunt of the offender's crime, whereas it is said in the Holy Quran:

"That no laden one shall bear another's load." (53:38)

But the question of *diyat* is an exception to this rule. The reason for this is, the circumstances of the offender and the victim's party. On these grounds such an exception is the demand of justice and guarantee of the recovery of the dues. The exception in question is warranted on the following grounds:

1. If we apply the rule in its entirety to this question and suffer every offender to bear the consequences of his act, the result would be that only the well-to-do would be liable to punishment, who are small in number and the poor could not be awarded any punishment who are in majority. Consequently if the offender is affluent, the victim or his lawful guardian will receive *diyat* in full and, in case if he happens to be of moderate means, *diyat* could be recovered partially but if he is indigent, as is mostly the case, the victims will get no *diyat* at all. Thus there will be no justice between the offenders and the victims. It is for the reason that exemption must be given from the general rule relating to the problem under discussion.

2. Although *diyat* constitutes a punishment yet it is also the pecuniary right of the victim or his rightful guardian. Allowance has been made in this blood-price for serving as a fair compensation for the offence. Now if the rule mentioned above is extended to this case *in toto* and the accused is declared as liable to the payment of *diyat* alone, then a large number of victims will not be able to recover *diyat* for the amount fixed for full *diyat* is beyond the financial means of a common man. The value of a hundred camels come to more than a thousand dinar. Obviously, full amount of *diyat* is not within the means of an average individual. Hence if the rule in question is applied in its entirety in this case and hold the offender also responsible for the results of his act, the victim's party will not be able to recover what is due to them. In this context, therefore, exemption from the general rule alone would ensure the realization of their dues by the aggrieved party.

It should be taken into consideration here that in the case of intentional sanguinary offences the victims are not always confronted with such a situation. Here the primary or basic punishment is *qisas*, which is changed into *diyat* only when the victim or his lawful guardian forgives the offender. No victim's part will remit *qisas*, unless the recovery of *diyat* is guaranteed. If anyone remits *qisas* and chooses to receive *diyat* in lieu thereof, and the assets or property of the offender turns out to be less than the value of *diyat*, the case is open to the option of the victim or his lawful guardian anyone of them is not to suffer a loss on account of the situation wherein they place themselves.

3. The impact of burden on *'aaqila* (family) is associated with inadvertent or quasi-intentional offences, (the latter being correlated with inadvertent crimes). The offences committed unintentionally owe themselves to inattention and carelessness, and both these weaknesses are the result of the lack of right guidance and bad training. Therefore, the people who will be held responsible for the guidance and training of the individuals are those related to the offender by blood. As the individual is influenced by the member of his family and bears close affinity to them in all matters, his negligence and carelessness would be attributed to the influence of the family. Family, in its turn, is subject to the impact of the society. Hence negligence and carelessness would be finally treated as social legacy.

Hence it is necessary that the family and the society both should bear the consequences of the individual's mistakes. If the *'aaqila* cannot afford it to do so, then the society as a whole should bear the burden thereof.

We may say that inattention and carelessness spring from the consciousness of honour and power and this state of mind stems from the conjunction of the family and the society, for it has been observed that those who have no family are more careful and cautious than those with a family and those with a small family are more careful and cautious than those having a larger *family.* Hence it is necessary for the family and the society that they should bear the brunt of the individual's inadvertence because they are the ultimate source of the carelessness and negligence

resulting in his grave mistake. The family system and the social system both stand on the firm basis of natural sympathy and mutual cooperation. It is therefore, incumbent on every individual of the family to co-operate with and help all the other members of the family and this is also obligatory for every individual of the society. Making first the family and then the society bear the consequence of an individual's inadvertence brings effectively into play the spirit of mutual health and fellow feeling. In fact it renews and reaffirms this spirit each and every moment. Thus whenever an individual commits one of the unintentional offences, the offender contacts members of his family, and the family members in their turn contact members of other families and co-operate in this way in the collection of the blood-price. As the unintentional crimes are very common, reciprocal expression of sympathy and mutual contact and cooperation among the individuals of the society continuous unbroken.

4. As the result of burdening the offender and his family with payment of the *diyat* due from him, the offenders, in general, are treated in a human and benign manner, their punishment is mitigated and they are not wronged or oppressed. The reason for this is that the offender whose family bears the burden of his *diyat* would at some stage play himself the role of bearing the burden of the *diyat* due from another individual and since to err is human, it is also most likely that the offender would share the burden of the *diyat* of another family member to the same extent as this member bears the burden of the offender's *diyat.*

5. The fundamental principle of the *Shariah* is to protect the life of the people and to guarantee the safeguard against the loss thereof without any reason. That is why *diyat* has been prescribed in lieu of life and its loss without any rhyme or reason. Now if every offender alone is held responsible for the payment of his *diyat* and he is unable to pay it, the victim's life would turn out to have been lost. Hence exemption from the general rule is imperative, so that the life of the people may not be lost in vain.

In short, these are the justifications for the exemption from the general rule. This is the only exception to the divine decree 'That no laden one shall bear another's load'. In the modern

legal terminology this is solitary exemption in the individuality of punishment. The *Shariah* has allowed this solitary exemption because it ensures mercy, justice and equality. It guarantees protection of life and complete realization of what is due.[1]

The question is if the system of *'aaqila* can be established in present age, wherein justice and equality between the offender and the victims is ensured. It is not possible to establish such a system because it presupposes the existence of family system. But this system has disintegrated. Whatever remains of it consists of too small a number of individuals to make them bear the burden of *diyat.* The existence of *'aaqila* is possible only when the people guard their descents and relationships and remain clung to their paternal tribes and clans. But in most countries such a situation no longer exists. For this reason there is no alternative but to accept either of the two opinions of the jurists: Either the offender be suffered to bear the entire burden of *diyat* or *diyat* will be paid cut of public treasury.

If the whole burden of *diyat* is placed on the shoulders of the offender, the victim's life would have been wasted (i.e. the offender will not be able to pay *diyat)* because the offenders are generally poor. Obviously this is not consistent with the *Shariah.* Besides, there is no justice and equality in such a situation.

On the other hand, should we accept the other opinion, the public exchequer will be required to bear the burden of *diyat.* This would meet the requirement of justice, security of life would be ensured and the aim of the *Shariah* fulfilled. Hence the burdening of the public exchequer should not stand in the way of the achievement of the objectives of the *Shariah.* The government may rather levy a tax or earmark certain amounts realized through certain fines for the payment of this kind of compensations. Moreover, if modern states assume the responsibility of providing social security for the indigent, who can't take upon themselves the responsibility of the payment of compensation on behalf of the victim and his oppressed heirs?[2]

Some European countries like Germany, Italy and Yugoslavia

1. Please see article No.281.
2. *Al Mausoat-ul-Janai'ah,* Vol.5. P. 124.

have adopted this concept and have earmarked a special fund for the purpose known as the mulct fund. In this fund those fines are deposited which the courts impose. Income from this fund is reserved for the payment of the mulct of those offenders whose possessions and assets are not sufficient to pay the mulct due from them.

The part of *'aaqila* system adopted by some European countries is meant to achieve the objectives which the *Shariah* takes into account. Now if the system could be established in its present form in Europe, it is actually our own system which ought to be established among the Muslims, so that the aims of the *Shariah* may be fulfilled under our circumstances.

473. Expiation or Penance (Kaffarah)

The Quranic injunction with regard to expiation is as under:

> It is not for a believer to kill a believer unless it be by a mistake. He who hath killed a believer by mistake must set free a believing slave and pay the blood-money to the family of the slain, unless they remit it as a charity. If he (the victim) be of a people hostile unto you, and he is a believer, then the (penance is) to set free a believing slave. And if he cometh of a folk between whom and you there is a covenant then the blood-money must be paid unto his folk and (also) a believing slave must be set free. And whoso has not the wherewithal must fast two consecutive months. A penance from Allah. Allah is Knower, Wise." (4:92)

Penance is basic punishment, i.e. setting free a believing slave. If anyone does not have a slave or the price of a slave, he should fast for two months consecutively. In other words, fasting is an alternate punishment. It is awarded when the primary punishment cannot be enforced.

It appeals from the Quranic verse cited above that penance is prescribed in the case of an unintentional offence and also the consensus of the jurists is that in such a crime penance is essential. It is also essential in the case of quasi-intentional offence because this kind of offence, too, is unintentional because the offender does not actually intend to kill the victim when committing the crime.

As regards expiation for intentional homicide, the jurists are not unanimous. Imam Shafi'ee is of the view that penance is obligatory in the case of felonious homicide, because since it is essential for inadvertent homicide in spite of the fact that no sin is involved, it should be all the more so in the case of intentional homicide because it constitutes grievous sin.[1] One of the opinions attributed to Imam Ahmed is in harmony with Imam Shafi'ee's opinion, while the position of his school, is that intentional homicide does not involve penance because the Quranic injunction relating to such homicide is devoid of any reference to penance.[2] Imam Abu Hanifa holds that intentional homicide does not involve penance, inasmuch as penance is one of the prescribed punishments and as such it necessarily requires a Quranic provision.[3] As for Imam Malik, he does not consider penance obligatory in the case of intentional homicide but at the same time he holds that penance is desirable for intentional homicide when retaliation *(qisas)* is not carried out, whether the cause of such omission is an inhibitory injunction of *Shariah* or remission on the part of the lawful guardian of the victim.[4]

Imam Malik, Imam Shafi'ee and Imam Ahmed do not differentiate between direct and indirect offences of murder involving obligatory penance. Imam Abu Hanifa, on the other hand, holds that no penance is obligatory in cases of homicide committed indirectly, whatever the kind of such a homicide, even if it is unintentional murder.[5]

Who is liable to penance?

According to Imam Shafi'ee and Imam Ahmed penance is obligatory for every murderer whether he is adult or minor, sane or insane, Muslim or non-Muslim.[6] Imam Malik maintains that it is obligatory for minor, adult, sane, or insane provided that the offender is a Muslim. There is no penance for a non-Muslim because penance involves divine worship.[7] Imam Abu Hanifa is

1. *Al Muhazzab,* Vol.2, P.334.
2. *Al Mughni,* Vol. 10, P.40.
3. *Al Bahr-ul-Raiq,* Vol.8, P.291.
4. *Mawahib-ul-Jaleel,* Vol. 6, P.268.
5. *Sharh-al-Durdeer,* Vol. 4, P. *254;AJBahr-u1-Raiq,* Vol.8, P. 293;*Al-Mughni.* Vol. 10, P. *37;Al Muhazzab,* Vol.2, P.234.
6. *Al-Mughni,* Vol.10, P. *38;Nihayat ul-Muhtaj,* Vol. 7.
7. *Sharhul-Durdeer,* Vol.4, P. *254;Mawahibul Jaleel* Vol.6, P.286.

of the view that penance is obligatory only for an adult Muslim, for *Shariah* (laws) does not address a child or an insane person and it is not obligatory for a non-Muslim because it comprises divine worship. It is both worship and penalty.

Imam Shafi'ee and Imam Ahmed argue that expiation or penance is a substantial punishment (involving things having value) and although an insane person or a minor is not liable to be held responsible for his acts on criminal grounds, yet they serve as a guarantee against those acts and that expiation is obligatory for a non-Muslim, for the Quranic injunction is of a general nature.

Fasting.

The alternative to the primary punishment of setting a slave free is the penalty of fasting. The latter punishment, however, will be obligatory only when the killer does not have a slave to set free or money in excess of the value of the slave, leaving the amount required to meet his own basic needs. If he possesses a slave or equivalent amount, then fasting is not obligatory.

474. Disinheritance.

Deprivation from inheritance is a subsidiary punishment. It is applicable to the offender as a penalty ancillary to the punishment of homicide. The source of this penalty is a saying of the Holy Prophet (S.A.W.) which is as under:

"A killer has no share in patrimony (inheritance)".

Again,

"No right of inheritance is given to a killer subsequent to the anecdote of a killer in sura Al-Baqara."

Divergence of opinion among the jurists with regard to inheritance is so great that no two schools are in agreement. For instance, Imam Malik holds that commitment of intentional homicide is rebellion entailing disinheritance whether the murder is committed directly or indirectly and whether or not retaliation against the killer has been carried out or *qisas* is invalidated for any reason whatsoever. But in the case of unintentional homicide the killer is not deprived of inheritance. He can, however, be

deprived of *diyat* obligation on account of murder.[1] According to the predominent opinion of Malikite school a child and an insane person, too, would be disinherited.

In the opinion of Imam Abu Hanifa, if murder is committed directly and as an act of oppression, the killer will be deprived of inheritance, whatever the kind of murder he is guilty of. But a child and a person of unsound mind will not be deprived of it.[2]

The jurists belonging to the school of Imam Shafi'ee also differ among themselves on the question of disinheritance. Some of them differentiate between the homicide which it is impossible to justify on grounds of *Shariah* and the homicide warranted by it. If it is not possible to treat a homicide as legitimate, the killer according to this group stands disinherited, for the victim in such a case is murdered wrongfully. If the murder could be justified by the injunction of the *Shariah,* the killer according to them does have the right to inheritance because the victim is killed legitimately. Some jurists hold that if the killer is accused of murdering the victim because he wanted to acquire patrimony before long, he will be disinherited, just as one guilty of unintentional homicide or as one against whom the judge gives verdict on his offence having been proved, for the charge is brought against the killer of acquiring patrimony earlier than it falls due. If such a charge cannot be levelled. then the killer does not lose his right of inheritance, just as the charge of adultery against the heir is established on his own confession of the guilt.

But the preferable opinion of the Shafi'ee school is at variance with the two views mentioned above. According to this opinion, the killer stands disinherited in all cases, whether the homicide committed is intentional or unintentional, the killer is of sound or unsound mind, minor or adult. The jurists holding this opinion maintain that the object of disinheritance is to curb the heir's means of acquiring patrimony earlier than it devolves upon him.[3]

The position of Imam Ahmed is that unjustifiable homicide alone annuls the right to inheritance and legitimate homicide does not stand in the way of inheritance, for instance, killing in

1. *Sharh-ul-Durdeer,* Vol.4, P. 254;*Mawahih-ul-Jaleel,* Vol.6 P. 286.
2. *Al Bahrul-Raiq,* Vol. 8, PP.488-500.
3. *Al Muhuzzab,* Vol.2. P.26.

self-defence or retaliation. The explanation offered by Imam Ahmed's school to the disinheritance of a child and a person of unsound mind is this that the act committed by either of them is unlawful, but neither is liable to *had* punishment because of disqualification. But disqualification from *qisas* is no obstacle to disinheritance. Therefore, to be on the safer side, a child and an insane person guilty of murder should be deprived of patrimony in order to safeguard the life of the people.[1]

475. Exclusion from Will

Exclusion from will is a natural punishment originating from the following saying of the Holy Prophet (S.A.W.):

"Bequest in favour of a killer is not right."

Again, says the Prophet (S.A.W.):

"There is nothing for the killer."

Nothing here applies to both patrimony and will.

The jurists differ on the interpretation as well as applicability of both these edicts. The Malikites draw a line of distinction between intentional and unintentional homicide in this regard. They are agreed that unintentional homicide does not debar the killer from inclusion in the will and, therefore, he can legitimately be given a share in property bequeathed, if the killer does not know that he is his killer. Even if he knows that he is the killer, it is right to bequeath to him both property and blood-price. But so far as the intentional homicide is concerned, the Malikites disagree. Some of them opine that if the victim or the person murdered did not know that the offender was his killer, then bequest is not valid. However, if the victim knows that he has been murdered by the killer and decides to include him in his will, then bequest of property is legitimate but that of blood-price is invalid, provided that he does so after the offence has been committed. But bequest of blood-price would not be legitimate; for *diyat* or blood-price is an asset which becomes obligatory after the death of the victim. Besides, if the bequest is made before the commitment of murder, then such a bequest will be invalidated following intentional murder, except that the victim

1. *Al Iqna,* Vol.3, P. 123; *Majalla-tul-Qanoon wal Iqtisad,* Vol. 6, P. 586.

wishes to keep it up. There are others who hold that bequest in favour of a killer is warrantable whether or not the victim was in the know that he was his killer. Moreover, bequest is valid whether it is effected before the murder or after it.[1]

Imam Abu Hanifa is of the view that a killer stands disinherited whatever the nature of homicide; provided that it is committed directly and wrongfully and that the killer is adult and a person of sound mind. According to Imam Abu Hanifa if the lawful heirs of the victim permit, the bequest would be valid but Imam Abu Yousuf opines that the bequest would be invalid even if the victim's heirs are agreed, because the obstacle to bequest is homicide and not the heirs' interest.[2]

As regards the school of Imam Shafi'ee, there are two divergent views. First, bequest in favour of a killer is unwarrantable. This position is taken by two groups holding different opinions. One group would not acknowledge the legitimacy of bequest despite the heir's permission on the ground that bequest is inhibited by homicide and not by any consideration of the heirs' interest. Hence the permission of the heirs amounts to a gift devoid of the conditions of a gift. The other group opines that with the permission of the heir's bequest in favour of the killer is valid.

According to the other view of the Shafi'ee school, bequest in favour of a killer is valid in all circumstances and is not subject to the heirs' permission.[3]

1. *Mawahib-ul-Jaleel,* Vol. 6. P. 386;*Sharh-ul-Durdeer,* Vol. 4, P. 379.
2. *Bada'e-wal-Sana'e,* Vol. 7, P. 339-340.
3. *Al Muhazzab* Vol. 1, P. 457; *Al Aqna'a* Vol. 3, P. 59; *Al Sharh-ul-Kabeer,* Vol. 9, P. 424-425.

SECTION III

PUNITORY EXPIATIONS

476. Expiation (Kaffarah) is the punishment prescribed for a sin.

It is meant to ward off the evil effects of a sin or to atone for a sinful deed. Expiation, in reality, is a sort of worship; for it consists in setting a slave free, feeding the poor, or fasting. If *Kaffarah* is prescribed for or in lieu of an act, it is purely in the nature of worship; for instance, if a person does not have the strength of fasting, he is to feed the poor instead. However, if it becomes obligatory as the result of a sin, it is purely in the nature of criminal punishment, for instance *Kaffarah* prescribed for murder committed inadvertently. Thus expiation, as laid down in the Islamic *Shari'ah,* is two-sided: criminal and religious as it is both punishment and worship. We may term it as punitory worship.

Expiations are those penalties whose quantum has been fixed by the Law-giver having laid down the limitations thereof. Expiation is obligatory only in matters wherein the Law giver has declared it obligatory by an unambiguous edict.

The offences for which expiation is imperative are as follows:

1) Breaking the fast.
2) Violation of the conditions of *'Ahram.'*
3) Breaking a vow.
4) Sexual intercourse during menstrual period.
5) Sexual intercourse in the state of *'zihar'* (what is tantamount to the effect of divorce particularly saying to one's wife, "you are like a mother to me.")
6) Homicide

Expiation is not the same in the case of all these offences. It varies with the kind of sin and different in respect of nature, quantum and the method of atonement.

In respect of certain offences expiation is coupled with

some other prescribed punishment. There are other offences that involve an unprescribed punishment along with expiation, such as *ta'zeer,* for instance in the case of zihar.[1]

The expiations laid down by the *Shariah* as punishments are: setting a slave free, feeding the poor, clothing the poor and fasting.

First, setting a slave free. There are specific conditions of this expiation. It will be out of place to mention them here. Besides such conditions, it is stipulated that the slave to be freed must be in excees of the master's requirements. But if no surplus slave exists and the master has extra amount of money equivalent to a slave's price, he should pay it as a penance.

In this age of freedom when the institution of slavery does not exist, expiation should be made in surplus cash possessed by the master equal to the price of a slave.

Second, feeding the poor. Feeding as in expiation varies with the nature of offence. For instance, expiation for the violation of oath is feeding *ten* destitutes and breaking a fast entails feeding *sixty* destitutes.

Feeding must be with the average the sinner might be used to feed his family members. It must be done one and the same time.

Third, clothing the poor. This is prescribed only for breaking one's oath, because the relevant Quranic injunction relates to oaths only. Says Allah:

"The expiation thereof is the feeding of *ten* of the needy with the average of the wherewith ye feed your own folk, or the clothing of them." (5:89)

Fourth, fasting. This expiation is obligatory only when the offender is unable to fulfil the obligations of other expiations. The period of fasting also varies with the sorts of crimes committed. For instance the 'yameen' (Breaking of Oath) expiation involves three days' fasting and intentional homicide *two* months' fasting.

It goes without saying that the fasting penance is meant for the Muslims only. Non-Muslims' expiation in the form of fasting is not acceptable, because fasting is worship which is not obligatory for the non-Muslims.

1. *Tabsirat-ul-Hukkam,* Vol. 2, P. 259; *Al Muqaddimat Mulla bin Rushd,* Vol.2, P. *151;Asna-ul-Matalib,* Vol. 4, P.162.

SECTION IV

PENAL PUNISHMENTS OR TA'ZEERS

477. The Nature of Ta'zeer.

Ta'zeer means chastisement prescribed for such offences as do not involve *hudood,* i.e. offences for which the *Shariah* does not lay down specific punishments.

Ta'zeers are a set of unspecified punishments which range from minor punishments such as admonition and warning to severe punishments like lashes and even capital punishment in the case of murder. The court is empowered to award any of such punishments as it deems fit keeping in view the psychological condition and the background of the offender.

With the exception of offences involving hudood, *qisas* and *diyat* for which specific punishments have been laid down, penal punishments may be awarded in all the offences. These punishments also constitute basic punishments in the case of *hudood* and *qisas* offences when they may be awarded as alternative penalties and so it would be the case when the basic punishments of such offences stand invalidated. For example, when the conditions of awarding a *had* is not fulfilled, *ta'zeer* may be awarded or a *ta'zeer* punishment may be coupled with a basic punishment as an additional penalty, as for example, Imam Abu Hanifa prescribes banishment in the case of adultery, Imam Malik prescribes penal punishments as a requital for causing wounds and Imam Shafi'ee add forty lashes to the *had* prescribed for drinking wine.

The punitive approach of Islamic criminal law is unlike the modern laws in operation. It does not lay down a definite penalty for every *ta'zeer* offence, because if the court is restricted to pass definite or specific sentences, the punishments awarded would not produce the desired effect and the spirit of justice cannot be maintained, for the circumstance of the offender and those in

which offences are committed are so different from one another that if a punishment results in the correction of one offender it would bring about corruption of another, and that the same punishment may serve as a deterrent to one offender but does not do so in the case of another offender. It is for this reason that Islamic *Shariah* has laid down a set of numerous punishments ranging from ordinary chastisement to most severe penalties and confers on the court the power to award any of them as it deems fit for the reformation of the offender and safeguard the community against the impact of the offence concerned. Besides, the court has the power to award one or more penal punishments for a crime, and if a punishment corrects two limits, it may reduce it or may suspend a punishment if it considers necessary for the reformation of the offender or making him desist from committing an offence.

The wide powers conferred on the court in respect of *ta'zeer* punishments poses no danger of producing effects, for generally speaking offences involving *ta'zeers* are not dangerous. In fact latitude and leniency in such cases are more likely to reform the offender, whereas in the case of dangerous offences entailing *hudood, qisas* and blood price the *Shariah* has specified definite punishments and when such offences are proved, the court cannot but award the punishments so specified.

Although the *Shariah* has identified *ta'zeer* punishments, but this does not mean that it does not acknowledge any other punishment. In fact, there is ample scope in the *Shariah* for any corrective penalty that may reform the offender and the community is protected against the evil effects of his offence. One of the principles of the Shariah is that what-ever punishment serves to reform the offender and save the community from the impact of his sinful acts is a lawful punish merit.

478. Difference between Ta'zeers and other Punishments

There are numerous unmistakable differences between penal punishments and the punishments of *hudood, qisas* and *diyat*. Some of them are as follows:

(1) *Hudood, qisas* and *diyat* are specifically definite punishments, wherein the court has no power to make any change.

In fact these punishments can neither be mitigated nor increased, even if they be punishments with two limits, for their fixed quantum and determination have turned them into single-limit punishments.

On the contrary, the *ta'zeers* are not specifically prescribed in relation to offence and the court is empowered to award any one of such punishments as it deems fit. These punishments carry two limits: the lowest and the highest. The court may choose any of these degrees. Some of them have only one limit such as admonition and exhortation. But in spite of this it is not binding on the court to award a particular punishment, except that the punishment it chooses to award must be appropriate in consideration of the offender's circumstances.

(2). Punishments constituting *hudood, qisas* and *diyat* are irremissible and *irrevocable,* whereas in respect of offences involving *ta'zeers* the person in authority or the ruler is competent to forgive the offence, whether it is one making impact on the community or on the individuals.

(3). In the case of offences involving *hudood,* qisas and *diyat,* the offence is kept in view and the personality of the offender is of no consequence while in respect of *ta'zeers* both the offence and the offender are taken into consideration.

479. The kinds of Ta'zeers or Penal Punishments

The *Shariah* provides for many kinds of *ta'zeers*. Some of them, which the *Shariah* puts into *effect,* are stated below. It may, however, be borne in mind that the *Shariah* does prohibit any other penalty which serves the purpose of the punishments as laid down by it.

480. Capital Punishment

One of the principles of the Shariah is that *ta'zeer* is designed to reform the offender and, therefore, the appropriate *ta'zeer* is that which poses no threat to the life of the offender.[1] Hence tazeer punishments should not be mortal. That is why death penalty and amputation of limb as tazeer is totally disallowed.[2]

1. *Al Bahrul-Raiq,* Vol.5, P. 49; *Sharh-al-Zurqani,* Vol. 8, PP.115-116.
2. *Ibid; Tabserat-ul-Hukkam.* Vol.2, P. *264; Al Iqna,* Vol. 4. P. 269.

But most of the jurists allowing exception to this general rule, maintain that death penalty as *ta'zeer* is warrantable provided that public good requires it or that the life of the offender poses the danger of perpetration of evil caused by him which can only be eradicated by his execution, as for example the execution of a spy or one calling upon the Muslims to accept innovations in their faith, or a dangerous habitual.[1]

Although by allowing exemption from the general rule, death penalty has been made lawful as a penal punishment, yet it will not be widely enforced, nor the decision thereof will be left to the discretion of the court like other *ta'zeers*. Such offences as call for the offender's penal execution will be determined by the ruler or the person in authority. The jurists have striven strenuously to determine and delimit the *ta'zeer* offences necessitating capital punishment and have allowed execution only when it is absolutely essential and the offender is so incorrigible that all endeavours to reform him product no effect, or when it becomes absolutely necessary to exterminate him in order to safeguard the society against the evil effects of his acts.

According to the Hanafites it is improper to award death penalty by way of *ta'zeer*. They hold that execution in such a case is killing as chastisement. Some Hanbalites particularly Ibn Taymiah and his pupil Ibn-al-Qayyim as well as some Malikites also subscribe to this view.[2]

But the offences for which Hanafites award death penalty as a *ta'zeer* or as a chastisement, are treated differently by other schools of jurisprudence. They regard such penalty as *had* or *qisas*. The wider scope allowed by the Hanafites in this case is merely overt in many circumstances. According to the Hanafi jurists, execution as a *ta'zeer* for committing homicide with something heavy and an act of sodomy is warrantable. They do

1 *Hashia Ibn 'Aabideen*, Vol. 3, PP. 247-248; *Al Iqna*, Vol. 4, P.271; *Al Tasqul Hukmiah*, Ibn Qayyim, P. 106; *Al Ikhtiarat* Ibn Taymiah. PP.178-179; *Mawahib-ul-Jaleel*, Vol. 3, P. 351; *Al Bahr-ul-Raiq*, Vol. 5, P. 45; *Mausoat-ul-Rasail, Al Hasabbah* P.58.

2 The jurists of the Shafi'ee school and most of those belonging to the Malikee school do not approve of death penalty as a *tazeer*. They would prefer to award life imprisonment to a dangerous and habitually wrong-doing criminal in order to protect the community against him. The opinion of these jurists are also supported hy some Hanbalites.

not treat it as *qisas* in the former case and as *had* in the latter. On the contrary the other three major Imams, Malik, Shafi'ee and Ahmed would award capital punishment to a killer who used something weighty for killing as qisas and for one guilty of sodomy as a *had*. The jurists of Hanbali and Maliki cults treat execution of a person calling upon the people to accept innovations as a *ta'zeer*, while other jurists regard one guilty of such an act as an apostate and call for his execution as a *had*.

In view of the conditions stated above, only a very limited number of crimes involve death penalty as a *ta'zeer*. As has already been explained, the *Shariah* has laid down the punishment of *hudood* for only four offences, and these are: adultery, bloodshed, apostasy, and rebellion. It has prescribed capital punishment for only one of the offences involving *qisas* and that is intentional homicide. As for the *ta'zeer* offences for which capital punishments are five only. Thus there are in all *ten* offences for which *Shariah* has prescribed death penalty. Some jurists who hold that death penalty as *ta'zeer* is not warrantable and thus in view of their opinion the number of crimes for which death-penalty is prescribed is reduced to *five*. The limited number of crimes involving capital punishment is a distinguishing characteristic of the Islamic *Shariah* which it has preserved right from the very beginning. It has not exceeded proper limits in laying down the death penalty, nor has it prescribed such penalty unless it is absolutely essential. This distinction of the *Shariah* may well be judged by comparing it to the man-made laws which had provided capital punishment for as many as about two hundred offences till the end of the eighteenth century. The French law prescribed death penalty for one hundred and fifteen offences.

During the latest period, some western countries made an attempt to abolish death penalty but in view of the Italian Theory it had to be abandoned. According to this Theory, if there is no hope to reform an offender, the best way to get rid of him is execution. Some countries had in effect even suspended the death penalty, but later it was restored by countries like Italy, Russia and Hungary. The laws of all the major Western countries like England, Germany, France and U.S.A. provide for capital

punishment and the most important justification offered for it is that death penalty is the best and surest way of eradication of crime, doing away with the offender and protection of the society against the evil caused by it and these were the very justifications that had already been stated by the jurists of Islam.

481. Punishment of Lashes

The punishment of flogging is one of the basic penalties laid down by the Islamic *Shariah,* as it constitutes one of the *hudood.* It is also included in the *ta'zeers.* As a matter of fact, it is preferable to all punishments for dangerous *ta'zeer* offences. The reason for its preference is that it prevents those habituals from committing crimes who develop an instinct for criminal behaviour. This is a punishment with two limits and either limit may be awarded taking into account the kind of offence and the person of the offender.

Besides, the punishment has a quality by virtue whereof neither the government is unnecessarily burdened nor the offender loses the ability to work. Thus his family is not deprived of support and maintenance, as is the case with the punishment of imprisonment. As a matter of fact, this is a sentence that could be carried out then and there, after which the offender is free to resume usual activities and his family is saved from being deprived of resource and support.

The most striking virtue of the punishment of flogging is that the offender is saved from the corrupting influence of the prison with its immoral and unhealthy atmosphere and lethargic habits and inertia.

The Maximum Limit of the Punishment of Flogging.

The jurists differ on this question. The well known position of the Maliki school is that the determination of the maximum limit of punishment depends on the discretion of the man in authority or the ruler, for *ta'zeer* is awarded in consideration of expediency and is commensurate with the offence. Hence the ruler will exert himself to arrive at the right decision. For this reason, Imam Malik maintains that the offender may be scourged

with more than a hundred stripes whereas in *hudood* the most severe punishment of lashes does not exceed a hundred stripes.[1]

According to Imam Abu Hanifa and Imam Muhammad the maximum limit of stripes as a *ta'zeer* punishment is thirty nine, while Imam Abu Yousuf prescribes seventy-five stripes. This limitation is based on the following edict of the Holy Prophet (S.A.W.):

"Whoever incroporates one *had* into another is a transgressor."

The ground of difference between Imam Abu Hanifa and Imam Muhammad on the one hand and Imam Abu Yousuf on the other is that according to the former the term *hudood* occurring in the above tradition is used as a common noun, and therefore it may mean any *had.* Since maximum limit of forty stripes are prescribed for a slave, deducting one stripe would come to thirty-nine stripes, whereas Imam Yousuf takes the word *had* to mean eighty stripes as prescribed for free men and, therefore, he agrees on the basis of analogy that the maximum limit of stripes as *ta'zeer* should be seventy-nine stripes. But since verdict of Hazrat Ali (R.A.A.) exists who has curtailed five stripes and prescribed seventy-five stripes, Imam Abu Yousuf too lays down seventy-five stripes.[2]

There are three opinions in the *Shafi'ee* school about the problem under discussion. The first opinion is in agreement with the position of Imam Abu Hanifa and Imam Muhammad. The second opinion is identical with that of Abu Yousuf. But according to the third opinion that the maximum may be more than seventy-five stripes[3] but should not exceed hundred stripes.[4] In this regard every offence involving *had* should be considered with another offence similar thereto. Accordingly *ta'zeer* in case of adultery will be less than the *had* prescribed for adultery even if it is

1. *Tabseratul Hukkam,* Vol.2, PP. 262-263; *Mawahib-ul-Jaleel.* Vol. 6, P. 309
2. *Sharh Fath-ul-Qadeer,* Vol.4, P.214; Al Bahrul Raiq. Vol.5, P. 51.
3. *Nihayat-usl-Muhtaj,* Vol. 8, P. 201; *Al Ahkum-ul-Sultania,* P. 206; *Asni-ul-Matalib,* Vol. 4, P. 162.
4. Body of the Shafi'ee jurists hold that the punishment of tazeer would exceed a hundred Stripes when no hud is prescribed for the offence concerned.
   Please see Majmooath-ul-Rasail Ibn Taymiah, P. 57; Al Faroeeq-ul-Hukmiah P. 106. But this opinion is not found in the books of the Shafi'ee school.

more than the *had* for adultery. And the *ta'zeer* for abusing will be less than the *had* for slander. In other words, in the case of any offence, *ta'zeer* of stripes will be less than the number of stripes laid down as *had* for the same offence. Similarly the *ta'zeer* for abusing will be less than the *had* for slander.

Among the *Hanbalites* there are many divergent views. Of these three are identical with those referred to in the context of the *Shafi'ite* school. Besides, they hold two other opinions. One of them is that no punishment of lashes for any offence should be up to the extent of *hud* determined by the *Shariah* for similar offence, but it may be that the punishment for the offence exceeds the limit of the *had* prescribed by the *Shariah* for another kind of offence. For instance, the *had* laid down for an unmarried adulterer is a hundred stripes and for a married one is *rajm* (stoning to death). It will, therefore, be wrong that in cases of adultery involving carnal embrace and kissing in private by an unmarried person, the punishment should overlap the *had* laid down for adultery. However, if the adulterer be a married person he may be scourged with more than a hundred stripes because such a person is liable to *rajm,* which no maximum quantum of punishment can equal. According to the other opinion referred to above, it should on no account exceed ten lashes. Those who take this position argue on the ground of the following tradition as narrated by Hazrat Abu Bardah (R.A.A.):

> "No person should be scourged with more than ten stripes save the limits laid down by Allah."[1]

Some jurists attribute this opinion to Imam Shafi'ee also. But in the works of the *Shafi'ites* that I could lay hands on, I have not come across any such opinion. But the jurists who attribute it to Imam Shafi'ee maintain that as the Imam regards only the authentic *Hadith* as his creed, the opinion in question must be presumed to be held by him because it owes itself to an authentic *Hadith.*[2]

The difference of opinion among the jurists of various schools

1 *Fatawa Ibn Tayimah*, Vol. 4, *Al Ikhtiarat* 187; *Al Mughni,* Vol. 15, P. 347, *Al Turq-ul-Hukmiah*, P. 106; Al uqna'a, Vol. 4, p. 270 and the sequel.

2 *Sharh Fath-ul-Qadeer*, Vol. 4, P. 215; *Al Turq-ul-Hukmia*, P. 106.

and those belonging to the same school in this respect owes its origin to two traditions already quoted. We repeat them below:

(1) "Whoever incorporates one *had* in another, is a transgressor."

(2) "No one is to be scourged with more than ten stripes save the limits laid down by Allah."

The first tradition has been rejected by the *Malikites* on the ground that it stands annulled. These jurists maintain that there is no limit to increase in *ta'zeer* and if the person in authority thinks it expedient to increase it beyond limit, he may do so. These jurists have also rejected the other tradition also as annulled or have said that it is peculiar to the times of the Prophet (S.A.W.). Some *Hanbalites* have, however, adopted this tradition.[1]

The jurists who consider the first tradition to be authentic, interpret it differently. Thus the interpretation put on it by some of them is that *ta'zeer* should not advance even to the least punishment of *had,* whereas other jurists fix eighty stripes as the lowest limit keeping in view the *hudood* laid down for free persons. There are others whose interpretation is that the *Hadith* in question implies general prohibition of any *ta'zeer* rising to a degree that it crosses into the limit of a *had* punishment or that the extent of *ta'zeer* for a crime whose class involves a *had* touches the degree of a *had.* In the opinion of these jurists some crimes will be considered on the analogy of other crimes and thus any crime which is equivalent to drinking wine and slander by virtue of its nature and dangerousness will be punishable or amenable to *ta'zeer* by less than eighty stripes.

Similarly, any crime which is like adultery in its nature and in respect of the danger it poses, will be punishable by less than a hundred stripes as *ta'zeer.* Besides, some jurists construe the *Hadith* under consideration as prohibiting *ta'zeer* to the extent of prescribed *had* for the kind of a crime involving *had.* If such crime does not involve *had, ta'zeer* may be awarded to the extent of a *had* and even more than that. For instance, if an unmarried man is found on the bed of a woman without copulating with her, it will be wrong to scourge him with a hundred stripes, because

1 *Sharh Fath-ul-Qadeer,* Vol.4, P.215, *Tabserat-ul-Hukkam,* Vol. 2, P. 263.

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the *had* laid down for an unmarried adulterer is a hundred stripes. But if he be a married man, he can legitimately be punished by a hundred or even more than a hundred stripes inasmuch as the *had* prescribed for a married adulterer is *rajm* or stoning to death. Similarly a thief may be given a hundred lashes, since the *had* for theft is amputation of a hand. But if the nature of crime is such that no *had* is prescribed for it, then the person in authority may award him as much *ta'zeer* punishment as he deems fit. In other words, the import of this *Hadith* is that no *ta'zeer* or penal punishment is awarded equivalent to a *had* for the kind of an offence for which *had* is prescribed but the conditions thereof are not fulfilled, for if this is done a complete offence will be at par with an incomplete offence and there will be no difference between the act fraught with conditions of a *had* and that devoid of such conditions. Probably this last opinion is preferable from both practical and rational viewpoints.

Some jurists are of the view that the minimum punishment of flogging is three lashes and that this quantity is sufficient for warning. But other jurists are not in favour of laying down minimum quantum since warning produces different effects on different people.[1]

There is nothing in the *Shariah* inhibiting the punishment of flogging in every offence involving *ta'zeer*. However, some jurists would prefer flogging for offences which by nature involve *had*. Therefore in cases of theft for which *had* cannot be enforced, flogging must be awarded. Similarly, in cases of adultery and slander that do not entail *hads*, flogging is to be awarded[2] According to these jurists, punishments of flogging etc. as *ta'zeer* is to be given for offences which by nature do not involve *had* as obligatory. The advocates of this view maintain that the element of correction and prevention from dangerous offences is predominant in punitive flogging and it is settled beyond question that the category for which *hudood* are laid down consists of more dangerous offences.[3]

1. *Sharh Fath-ul-Qadeer*. Vol. 4. P. 215, *Al Mughni* Vol. 10, P. 348; *Badai'e wal-Sana'e*, Vol.7, P.94.
2. *Badai'e-wal-Snai'e*, Vol. 7, P.67.
3 *Tabserat-ul-Hukkam* Vol. 2. P. 284; *Sharh Fath-ul-Qadeer*, Vol. 4, P. 216, *Al Ahkam-ul-Sultania*, P. 206; *Al Mughni*, Vol. 10, P. 348.

482. Punishment of Imprisonment

There are two kinds of punishment of imprisonment in the *Shariah:* Limited Imprisonment and Unlimited Imprisonment.

483. Limited Imprisonment

The *Shariah* prescribes limited imprisonment for *ta'zeer* offences habitually committed and such a punishment is awarded to habituals. We have already mentioned that the jurists prefer flogging to other punishments provided that the offences involved are dangerous or the offenders are so dangerous that they cannot be prevented from committing offences without being flogged.

The minimum term of limited imprisonment may be only a day but there is no consensus on unlimited imprisonment. Some jurists suggest six months, others one year and still others would leave maximum term to the decision of the person in authority.[1]

The jurists belonging to the *Shafi'ee* school limit the term of maximum imprisonment to less than a year on the ground that the period fixed for banishment as *had* in a case of adultery is one year. Imprisonment according to them should be less than a year so that punishment for a *non-had* offence may not turn into a *had*. The point of view of other schools is apparently that imprisonment should not be regarded as analogous to banishment.

Imprisonment and corporal punishment may be combined provided that one punishment is felt to be insufficient, but in this case the *Shafi'ites* impose the condition that two punishments can be inflicted only when one punishment is supplemented to the other. For instance, the offender is already scourged with half the number of stripes awarded as a *ta'zeer*, he will be imprisoned in lieu of the remaining half. Similarly if one fourth of lashes awarded is inflicted, he will have to serve a term of imprisonment for the remaining three fourths. But other jurists do not impose such a condition. They consider it right to scourge the offender with total number of stripes awarded as *ta'zeer* and must also be confined to prison till such time that it is deemed fit to reform him as well as to warn others.

The punishment of imprisonment in common with all the

1 See article No.98.

other punishment presupposes correction and reformation of the offender. If it is more likely than not that imprisonment will not serve the purpose of reformation, it ought to be replaced by some other punishment.

The viewpoint of *Shariah* as to imprisonment is quite different from that of the modern laws in operation; for, under the modern laws imprisonment is the primary punishment of all offences whether minor or serious, whereas in the *Islamic Shariah* it constitutes a secondary punishment and is awarded for offences of minor nature and the court is empowered to enforce it or not. If the court is of the view that this punishment will not serve the purpose, it will not be awarded.

The effect of this difference between the *Shariah* and the modern laws is that in the countries where the *Shariah* is operative the number of prisoners is comparatively limited and where the modern laws are in force this number sweils immeasurably.

The real situation obtaining today is that one of the most serious problems with which the modern criminologists are confronted is presented by jails and their inmates. The result of treating imprisonment as the basic punishment of all offences is unlimited increase of the prisoners who have filled the jails beyond capacity. Besides, prisons have turned into centres of conspiracies and training for commitment of offences, notwithstanding the main object of their establishment, that is to protect the society against the offenders. When the prisoners are put together in a jail, they are provided with the opportunity of getting introduced to each other. Thus they are able to chalk out programmes of criminal activities and benefit from one another's knowledge and experience. In other words, it has been practically proved that prisons have failed to teach lesson to the offenders. In fact, simple offenders guilty of misdemeanours turn into habituals capable of committing felonies.

Some people have made attempts to do away with the harmful effects of imprisonment. Methods have been devised to minimize such effects. But these methods have not served their purpose. They have rather brought in their own disadvantages. For instance, the inmates were contrived to live in isolation at night and live

together in the day time but should be totally disallowed to talk to one another. But this method involves a lot of additional expenditure. Besides, in order to prevent them from associating and talking with one another, they have been inflicted painful punishment. Another method is to keep every prisoner in strict isolation. This, too, involves heavy expenditure. Besides, solitary confinement often results in insanity. Some prisoners even go to the lengths of committing suicide in isolation. There is another method involving gradual process. This has been devised in Ireland. Under this arrangement the prisoner is initially kept in solitary confinement. After this initial phase extending to a certain length of time, he is allowed to mix up with other inmates but is disallowed to communicate to any of them. This has both the disadvantages that characterize the other two methods.

But the punishment of imprisonment as envisaged in the Islamic *Shariah* does not lead to such consequences, for such a punishment is prescribed for misdemeanors or minor offences and first offenders for a very short term and that too only when the court feels that imprisonment would do good to the offender. This is exactly the reason in the *Shariah* system the number of prisoners is extremely limited and they have to serve a very short term of imprisonment. Besides, those who are sentenced to imprisonment do not get depraved nor do they turn into habituals. Thus by the enforcement of the dictates of Islam all those evils ensuing from imprisonment under the operative modern laws are eradicated.

484. Unlimited Imprisonment

It is agreed by all that imprisonment for unlimited term is awarded to offenders guilty of heinous crimes and habituals, i.e. offenders who habitually commit murder, larceny and violence or repeatedly commit atrocities and do not desist from their criminal activities in spite of undergoing prescribed punishment. Such offenders will ever remain in prison. They will be released only when they repent and mend their ways. Those who cannot be reclaimed will spend all their lives in prison and thus the community will remain immune from their wickedness.

The jurists are also in total agreement on the question of determining the term of unlimited imprisonment. They hold that the term of such imprisonment will not be fixed in advance for there is no time limit for it. In fact it is life imprisonment which continues tili the prisoner's death or till he repents and is reclaimed.

The concept of imprisonment for unlimited period was inducted into the modern laws only towards the end of nineteenth century, whereas the *Shariah* had adopted it Thirteen Hundred years before. The Italians were the first to introduce it into their laws. They declared unlimited term of confinement as inevitable in view of the dual role of punishment consisting of eradication of crimes and reclamation of the offender. They held that the punishment of a reclaimable offender would be provisional and that of an incorrigible one would be co-extensive with life.

In contemporary criminology imprisonment for indefinite term is regarded as essential for maintenance of law and order and is treated as one of the latest punishments devised to reclaim offenders by psychological and sociological method.

There are divergent provisions for indefinite Imprisonment in the operative modern laws. Some of these laws provide for unqualified indefinite imprisonment. They require the court to pass sentence of imprisonment without fixing the term to be served. The organization responsible for the execution of the sentence will determine the term keeping in view the state of the offender. If the offender is reclaimed, his term will accordingly be reduced, but if he is a hopeless case, he will be kept in jail till his death. In French law promulgated on the 27th of February, 1885, this very concept has been adopted and treating the punishment of expulsion as indefinite the executive has been empowered to reduce the term of a prisoner if it so deems fit.

In some laws relative term of imprisonment is determined. This is done by fixing the lowest and highest limits which the punishment is not to be less and more as the case may be. The enforcing organization is allowed the choice to release the offender if he is reformed on expiry of the minimum term or suffer him to serve the maximum term if he is not reclaimed.

Some laws in operation lay down the initial limit of the term but do not specify the maximum period, as for example the Italian law which was promulgated in 1980. Other laws like that of Egypt prescribe maximum term of ordinary offenders and habituals respectively.

As for the insane accused, the Egyptian laws do not lay down any limit. It authorizes the public prosecutor that if the accused is confined as a precautionary, he should be sent to lunatic asylum.

Under the Belgian and Italian laws neurastheniacs and drug-addicts are sent away to reserved places for a fixed period.

From the foregoing statement we learn that the Islamic concept of indefinite imprisonment was introduced into the modern laws as late as the end of the nineteenth century. Some of these laws do not set a limit to the term of imprisonment at all like the *Shariah* while others do set a limit and some other laws combine application and limitation. In short, this concept originated from the *Islamic Shariah* whether or not the modern laws adopted it with or without reservation and qualification and application in this respect is simply the procedure of adopting the original concept.

To sum up, the Islamic Shariah has undeniably the distinction of laying down the best concepts of punishment.

485. Banishment

We have already discussed banishment in the context of the punishments laid down for adultery and have stated that Imam Abu Hanifa regards banishment as *ta'zeer* as opposed to other Imams who treat it as a *had.* However, all the jurists are agreed that in cases other than adultery, banishment constitutes *ta'zeer.*

Banishment or expulsion is resorted to when the acts of the offender are communicable and other people under his influence develop the tendency for criminal activity to their own detriment.

Some *Shafi'ite* and *Hanbalite* jurists are of the opinion that the term of banishment as *ta'zeer* should not be one year; for one year is the period prescribed for banishment as a part of punishment for adultery. In order to translate the following edict of the Holy Prophet (S.A.W.), it is obligatory to award penal punishment of expulsion for less than *a* year:

"Whoever incorporates one *had* into another is a transgressor."

But according to Imam Abu Hanifa punishment of banishment may be more than a year, because he regards it as *ta'zeer* and not as *had*. Imam Malik does treat banishment *as had* but holds that its term may be more than a year on the ground that the above *Hadith*, according to him, stands annulled. Some jurists of the schools of Imam Shafi'ee and Imam Ahmed subscribe to the view held by Imam Malik and Imam Abu Hanifa.

The jurists who hold that the period of banishment may be more than a year do not fix any period for it but treat it as an indefinite punishment and empower the ruler to remit the term of expulsion if the person involved repents and is reformed.

The convict sentenced to banishment will not be imprisoned, although some jurists opine that he is to be kept under observation and some restrictions are to be imposed upon him. In the same way Hazrat 'Umar (R.A.A.) expelled Nazr bin Hajjaj from Madinah.

Majority of modern criminologists are in favour of penal expulsion, because they feel that the punishment of imprisonment has proved to be ineffective in reclaiming offenders and sending them back into the society as useful citizens. The reason for this is that, however repentent a convicted offender may be, he cannot regain his place in the society, which will always hold him in contempt. He will consequently join the gangs of other offenders and wicked people. By his expulsion, on the contrary, the society will be saved from his baleful influence on the one hand and he will on the other hand have the opportunity to start his life afresh on the right lines in a new place.

The laws of western countries also provide for penal expulsion. England formerly used to expel her offenders to America and Australia. But this practice was stopped when the colonies in those lands protested against it. According to the French law promulgated in 1810 political leaders found guilty of conspiring against the established system were liable to expulsion. Similarly the French law provided for the expulsion to colonies of offenders sentenced to rigorous imprisonment. Again, under the Italian law, expulsion is treated as a supplementary punishment and minister of justice has the choice either sentence an offender to rigorous imprisonment or expulsion to a colony to be imprisoned.

486. Hanging

As has already been explained, hanging is prescribed as a *had* for an offence involving bloodshed and according to some jurists the offender is to be hanged after being executed while according to others he is to be hanged alive and then slain. As a matter of fact hanging as a *had* is a punishment of highway robbery and on this ground some jurists have expressed the view that hanging may also be a *ta'zeer* punishment.

When an offender is sentenced to hanging as a penal punishment1 he will not be slain, neither before nor after hanging. He would rather be hanged alive. The condemned man will not be stopped from eating and drinking. He will be allowed to perform ablution, but can offer prayer by gestures only. After being hanged, his body will not remain suspended for more than three days.

Justification for hanging as *ta'zeer* is that the Holy Prophet (S.A.W.) ordered one Abu Nab to be hanged on a hill.

The *Shafi'ee* and *Maliki* jurists place hanging in the category of *ta'zeers*, but the *Hanafites* and the *Hanbalites* do not specify it as such, but this does not mean that they do not regard hanging as a *ta'zeer;* for as a general rule, any punishment that is instrumental in the reclamation of an offender and protection of the community against his baleful influence will be treated as a legal (penal) punishment.[1]

In the case of hanging it is a corporal punishment aiming at the reclamation and public exposure of an offender, such as the children are punished by making them stand with their hands raised up or bend on their knees. (This punishment involves the process of reformation as well as exposure.)

It must be borne in mind that the penal punishments *(ta'zeers)* are not obligatory like *hudood* and *qisas*. Hence it is up to the discretion of the legislative body to provide for the punishment of hanging or omit it. If it considers that this punishment will do good in the case of a crime and for that matter, in the case of all the crimes, it may provide for hanging or else leave it out.

487. Admonition, Exhortation etc.

Exhortation or admonition is also a *ta'zeer* under the *Shariah*.

1. *Al Ahkamul Sultaniah* P.206, *Tabserat-ul-Hukkam*, Vol. 2. P 266.

If the court feels that the offender could be reformed by exhortation, it may acquit him after exhortation. Admonition has clearly been enjoined in the Holy Quran:

> "As for those (women) from whom ye fear rebellion, admonish them." (3:34)

In fact the *Shariah* provides for lesser *ta'zeers* than exhortation. Thus if the court simply announces the offence of an offender that too would amount to a *ta'zeer*. Even summoning by the court constitutes a *ta'zeer*. But it must be borne in mind that such *ta'zeers* are meant for those offenders about whom the court feels that they will produce the desired effect and the offenders will be reformed.

488. Boycott

One of the *ta'zeer* punishments laid down in the Shariah is boycott. Says Allah in connection with the penal punishment of wives:

> "Admonish them and banish them to beds apart." (4:34)

During the battle of Tabook three companions of the Prophet (S.A.W.) namely Ka'b bin Malik, Murrah bin Ruba'i ul 'Aamri and Hilal bin Omayyah lagged behind and did not participate in the battle. The Prophet (S.A.W.) punished them by severing all social relations with them. For fifty days no body talked to them and refrained from communicating with them till the following verse of the Holy Quran was revealed:

> "To the three also (did He turn in mercy) who were left behind, when the earth, vast as it is, was straitened for them, and their own souls were straitened for them till they be thought them that there is no refuge from Allah save toward Him. Then turned He unto them in mercy that they (too) might turn (repentant unto Him). Verily, Allah is Relenting, the Merciful. (9:118)

Hazrat Umar (R.A.A.) instructed the people to have no intercourse with Rabee' in addition to awarding him the punishments of flogging and banishment. Accordingly nobody talked to him until he repented and the governor of the town reported it to Hazrat 'Umar (R.A.A.) who, then, allowed the people to end his boycott.

489. Censure:

Censure is also a *ta'zeer* provided for in the *Shariah*. Should the court think that the offender would be reformed by Censure, it may have recourse thereto.

The Prophet (S.A.W.) himself had recourse to censure. For instance, Hazrat Abu Zar (R.A.A.) narrated that once he had quarralled with someone and reproached him by vituperating his mother. The Prophet (S.A.W.) rebuked Hazrat Abu Zar (R.A.A.) and said, 'Abu Zar, you have called his mother names. You have not yet purged yourself of pagan ignorance."

According to another tradition Hazrat Abdur Rahman bin Auf (R.A.A.) quarrelled with a slave in the presence of the Prophet (S.A.W.) and called him the son of a black slave-girl. On hearing this the Holy Prophet (S.A.W.) was enraged and raising his hand observed "No white man has the upper hand over any black man unless he is in the right."

Ashamed of himself Hazrat Abdur Rahman (R.A.A.) put his cheek on the ground and asked the slave to trample his face so that the slave may be gratified.

490. Warning.

Warning is also included in penal punishments which the *Shariah* provides for. But warning should be genuine and it is to be given when the court feels that it will produce the desired effect of setting the offender right. Warning as a *ta'zeer*, for instance, is this that the court should by way of intimidating the offender say that if he is found committing the same offence again, he will be flogged, imprisoned or awarded even a more severe punishment. Another form of warning is that the court having announced a sentence puts off its execution. The modern laws also provide for the punishments of admonition and warning. For instance, in the case of all offences committed for the first time by the offenders, judicial admonition is treated as a punishment provided that the court feels that such punishment would be effective in the reformation and deterrence of the offenders.

Under the modern laws various methods are adopted to enforce the punishment of warning. Some of these laws tend to put it into operation by sentencing the offender to punishment

and shen postpone its execution for some time. If the offender is found guilty of the offence again, the sentence is put into effect. Other laws require the court not to announce the sentence and defer the execution of its decision for some time. Other laws still prefer to warn the offender against the commitment of the offence again.

All these forms of warning under the modern laws are the various ways applying it as a punishment. They were adopted by the above laws as late as the end of the nineteenth and the beginning of the twentieth century, whereas the *Shariah* had included them thirteen centuries ago.

491. Public Exposure

One of the penal punishments under the *Shariah* is the public exposure of the offender which means his offence must be announced. Public exposure is actually resorted to in cases relating to the peoples confidence, for example giving false evidence or defrauding.

In ancient times the method adopted for public exposure was to proclaim the crime committed by an offender at public places and bazars. But today it is done by making announcements in the newspapers and putting up handbills at conspicuous places.

The modern laws in operation provide for the punishment of public exposure. Under the Egyptian law, for instance, this punishment has been awarded for profiteering and defrauding the public.

492. Other Punishments

The punishments stated above are not the only penal punishments *(ta'zeers)*. In fact, there are some other punishments as well. The thing is that penal punishments are not specifically prescribed penalties. It is rather left to the discretion of the ruler or the legislative authority to retain such punishments as it considers fit for the eradication of crimes and reclamation of the offenders and abandon those which it regards as fruitless. The only point to be kept in view in this regard, however, is that the essentials of the doctrine of punishment are not prejudiced.

The punishments mentioned above are important ones and

may be enforced for any offence whatsoever, but there are other punishments which are not common and cannot be awarded for every offence. The more important of these are as follows:

(1) *Demotion:* Those holding public offices whether as public servants or in honorary capacity are liable to this punishment.

(2) *Deprivation:* This means to deprive the offender of some of the rights he legally enjoys, for instance the right to testify, holding an office, disinheritance of a share in the booty to a slain person and invalidation of wife's expenses for living.

(3) *Confiscation:* This applies to all the instruments used in committing of an offence and all forbidden things.

(4) *Making Amends:* It means eradication of the effects produced by the offenders criminal act, for instance, demolition of a building constructed on thoroughfare, destruction of utensils used for drinking wine and mixing water in milk. These punishments are also included in the laws in force and are put into effect.

493. Fine

It is an established fact that fine has been imposed as a penal punishment under the *Shariah*. For instance fine for stealing fruit by plucking it from its tree is double the price of the stolen fruit. The offender will be liable to some appropriate penal punishment in addition to fine in accordance with the following edict of the Holy Prophet (S.A.W.):

"Whoever steals something is liable to fine equal to double the value as well as punishment."

Similarly, any one who hides a missing thing will not only return it but will also pay the fine equivalent to the value thereof. In the same way a half of the assets of the person will be confiscated who does not pay the poor due.[1]

Nonetheless, the jurists differ on the question whether fine is such a general punishment that it could be awarded for any offence whatsoever. Some jurists are of the opinion that pecuniary fine is a general penal punishment while others maintain that it does not constitute a general punishment.[2]

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1. *Aghatha-ul-Ahfaz,* vol.1, p. 331; *Aa'lamu Moqi'een* vol.2, p. 220.
2. *Ibid; Al-Mughni.* vol. 10, p. 348; *Al-Iqnaa* vol. 4 p. 270, *Tabserat'ul-Hukkaam* vol.2, p.261, *Sharh-al-Zurqani,* vol.8, p. 125 *Nihayat ul-Muhtaj,* vol. 8, p. 20; *Asna-al-Matalib* vol. 4, p. 162; *Sharh Fath-ul-Qadeer,* vol. 4, p. 212, *Hashiah ibn 'Aabideen,* vol. 3, p. 246, *Majmo-atur-Ras'ail,* p.59.

Some jurists object to pecuniary fine. They argue that such fine was valid during the life time of the Prophet (S.A.W.) and that it was abolished later on. Besides, they contend that this is not the proper way of eradicating crime, because if imposition of pecuniary fine is allowed, the tyrants will use it as a tool to extort money from the people.

The jurists who allow fine as a general punishment attach a proviso thereto to the effect that fine should be imposed as an intimidatory penalty. This is to be done by taking the money from the offender and withholding it. If he mends his ways the amount so received should be refunded or else expended on public welfare.

It may be said in favour of the jurists opposed to pecuniary fine that if such a fine is treated as a basic punishment the haves will have the upper hand over the have-nots, as the former will be able to pay it easily while the poor will not be able to do so. Thus it will not be possible to punish the poor by imposing fine, although such a punishment is the most ordinary penalty as compared to other punishments.

In the world today the affairs of the state are run in an organized manner, public finances are in safe hands, the legislative authority has prescribed the minimum and maximum limits of fine to be imposed and the function of awarding punishment has been assigned to the courts. Consequently the danger of extortion of money from the people has vanished. Thus the objection raised to the imposition of fine as a punishment no longer carries weight. Again, in cases of minor offences like misdemeanors the amount of fine is so small that most people can pay it easily. The second objection, therefore, is also untenable.

In any case, the jurists who treat pecuniary fine as a common punishment confine it to minor offences. They have not fixed any minimum or maximum limits of fine and have left its determination to the discretion of the court.

In the operative modern laws fine is treated as the basis of most offences and two methods have been laid down for putting it into effect. The first is to deprive the convict of his property or assets, and the second is that if he has no assets he should be

made to work in lieu of fine or imprisoned, although the modern laws treat imprisonment as a harsher punishment than fine.

The legal experts admit that there are many flaws in the punishment of fine and that they are trying to remove them. But in spite of all its demerits this punishment has the virtue of avoiding and limiting the demerits inherent in the punishment of imprisonment. In other words, the legal experts have not prescribed the punishment of fine because of its merits but have adopted it because its demerits are much less than imprisonment. Thus instead of adopting a better punishment they have preferred the less harmful to the more harmful punishment.

According to *Shariah* it is wrong to imprison an alleged offender in lieu of an amount due from him except that he can but does not pay it, as is the case with the amount payable for the maintenance of wife and children. But if he is not in a position to pay, he cannot be confined in lieu of the amount due, for failure to repay debt is punishable by imprisonment only when the debtor is able to pay it. But if he is in no position to pay it, he cannot be confined because the cause for confinement is absent. However, there is nothing in the *Shariah* inhibiting the realization of the amount due from the offender by making him do some official work and thus pay it out of the wages earned by him. The viewpoint of the *Shariah* in this context is both logically and legally correct for putting the offender to forced labour means that the punishment is applied to his income or assets much as the only source whereof is his labour. In such a case forced labour is tantamount to realization of the amount due by force. But if the offender is unable to pay the fine imposed and is confined in lieu thereof, it means that he is not really punished but confined for being poor. Thus confinement replacing fine would come to be exclusively associated with the poor. On the other hand the essential condition of basic punishment must be all embracive and applicable. If it is not all embracive it will be an illegal punishment.

The Islamic *Shariah* does not insist on imposing fine nor does it treat it as a general punishment for all or most of the offences involving *Ta'zeer*, for imprisonment is a secondary punishment in the Shariah. The basic punishment for most of the

offences is flogging and that is why the punitive system of the *Shariah* is free from the flaws inherent in the punishment of imprisonment and from the demerits for avoiding which the method of imposing fine has been adopted in the modern laws in force.

The *Shariah,* as a general rule, provides a collection of punishment for *ta'zeer* offences which vary in respect of the degree of harshness, and the court is empowered to choose out of those whatever penalty it deems fit in consideration of the offence and the circumstances of the offender. No doubt, some jurists treat fine as a general punishment but it means that fine is one of the penal punishments and the court may award it as such if it deems fit; but if it is not considered fit for the offence and the offender, such punishment is not to be awarded on any account.

SECTION V

494. The *Shariah* Punishments and Statistics Relating There to.

We have at the outset, discussed the kinds of punishments prescribed by the Islamic *Shariah* and have explained that it has laid down a separate penalty for each of the crimes involving *hudood* and *qisas*. In the case of such punishments the offence has been regarded as of paramount importance instead of the personality of the offender and powers of the court have been restricted, making obligatory on it to award an prescribed punishments without mitigating or increasing them. Besides, the powers of the legislative authority have also been restricted. It is not competent to make any change in the prescribed punishment, remit it or stop its enforcement. It may, however, add some penal punishment to it in order to punish the offender with increased degree of severity. For instance the legislative authority cannot reduce the punishment of *qazaf* (calumniation) to fifty stripes, but can add fine or imprisonment to its punishment laid down in the *Shariah*. This addition will assume the character of *Ta'zeer*. The legislative authority is not competent to substitute any other punishment for *qisas,* nor can it reduce blood price, but it may add flogging, imprisonment or any other penal punishment to the prescribed punishments of *qisas* and *diyat.*[1]

The penalties in respect whereof the *Shariah* keeps in view the offence in total disregard of the personality of the offender are offences entailing *hudood, qisas* and *diyat. They* are as follows:-

(1) Adultery
(2) Qazaf or Calumniation
(3) Drinking Wine
(4) Larceny
(5) Highway Robbery
(6) Apostasy

1. See Such articles No. 98.

(7) Fellonious Homicide
(8) Quasi-Intentional Homicide
(9) Unintentional Homicide
(10) Causing Wound and Injury Intentionally
(11) Causing Wound or Injury unintentionally.

In other words, the crimes in respect whereof the offender has been overlooked are twelve in number. In the case of crimes other than these, the offence and the offender both have been given due importance.

It seems to be somewhat difficult to understand the wisdom of *Shariah* in adopting harsh attitude toward the above twelve offences while being lenient in others that run into hundreds. The real difficulty lies in looking at these twelve offences in comparison to the rest of the offences, for their ratio to the latter is insignificant, which can be judged by taking stock of the sections of the laws regarding the offences involving *hudood, qisas* and *diyat,* and of those relating to other offence.

The number of the sections of the Egyptian punitive law regarding the *hudood, qisas* and *diyat* offences are less than fifty, whereas sections concerning other crimes and violations are some three hundred. Besides, there are other laws providing for punishments of many violations Assuming that their number is also three hundred, the crimes other than *hudood, qisas* and *diyat* offences would rise to the tune of six hundred (they are actually more than this). Thus the ratio of offences involving *hudood,* qisas and *diyat* to other crimes would be to 1 to 8. This is of course extremely small from theoretical viewpoint.

The following facts and figures will drive home the wisdom of the harshness of attitude adoped in the *Shariah* towards the offences involving, *hudood, qisas* and *diyat.* The incidence of these offences is very high whereas the incidence of most of the other offences is very small. Only a few of such offences take place frequently but their frequency cannot stand in comparison with that of the offences entailing *hudood* etc.

The wisdom of the *Shariah in* this regard is also manifest in the figures that follow. These figures are a clear indication of the fact that the incidence of the *hudood* and qisas offences is

very high in everyday life and that if they are eradicated the people will be absolutely oblivious to the occurrence of crimes. We quote here, for example, the figures of the offences committed in Egypt. In 1942-43, eight thousand one hundred and seventy five crimes were committed in the country. Out of these 752 were cases of intentional homicide, 1119 of attempted homicide, 989 were cases of larceny or attempted larceny, 2343 were of defamation and immoral acts, 326 those of fatal injuries, 1196 those of grievous injuries resulting in the mutilation of the victims and 634 were of recurrence of larceny. These are all offences involving *hudood* and *qisas,* their total number being 6270. It means the percentage of such offences in the year referred to was 76.7. The number of violations of law 297557, out of which 9732 were cases of larceny, 14828 of inadvertent wounding, 1182 of intentional homicide, 60230 of causing injury, 405 of defamation and abusing, and 4695 were of violence. All these cases involve *hudood, qisas* and *diyat* and their total number comes to 181762. It means that 61% of crimes amounting to violation of the law in force constitutes offences of *hudood* etc.

Ten years back in 1932-1933 the total number of offences committed was 7831. Out of them 4782 offences were those involving *hudood,* qisas and *diyat.* Thus their percentage was 61%. During the same year crimes consisting of violation of the laws in force, 132611 crimes in all were committed and 93990 of these involved *hudood, qisas* and *diyat,* and their overall percentage was 63.3%.

These figures do not tell lies. They clearly show that during the past twenty years the average of the offences involving *hudood, qisas* and *diyat* has been 72.2% while that of the cases consisting of the violation of the law in force has been 63.3%.

From the above figures it is manifest beyond a shadow of doubt that the great importance attached by the *Shariah* to the offences involving *hudood,* qisas and *diyat,* despite their limited number, is designed to eliminate such heinous offences occurring far more frequently than other crimes. In fact, it aims at weeding out crime altogether, because if these offences are excluded from the total number of crimes what remains is only a few violations of the law in force which neither result in the breach of peace

nor exercise evil influence on morality. Only light penal punishments will suffice for those guilty of such violations.

The above facts and figures also substantiate our statement that the *Shariah* has kept in view three objects in laying down the punishments of *hudood, qisas* and *diyat* offences, viz.; safeguard of peace and tranquillity, stability of the established political order and preservation of moral values. The nation which safeguards these three things ensures the safety of everything and nothing can stand in the way of its progress.

495. Shariah Punishments in the Light of Experience.

Prescription of harsh punishments for the eradication of crime is not enough to prove that the *Shariah* has been more successful in weeding out crime than the laws in force. It is necessary to produce evidence of the fact that the *Shariah* punishments have actually resulted in the eradication of crimes, for only the means and ends are of no consequence in this respect. What matters is the extent to which the means have been efficacious in the achievement of ends. The laws in force also have the same purpose in view, i.e. eradication of crime and they also provide punishments for this purpose, but they have practically failed to achieve it.

The only yardstick to measure the success of a criminal legal system is experience. No hollow arguments, however pleasing they may be, will be of any use in this regard. Such arguments sometimes prove to be true and sometimes false. I am not expressing my own opinion here. It has in fact been expressed by experts on the occasion of the International Law Congress. They unanimously expressed the view that the best system of criminal law is that which practically produces better results and it is only through experience that we can have the knowledge of such a system.

Latest experience has identified such an excellent system of criminal law and borne out that it is no other than the Islamic *Shariah.* The Islamic *Shariah* has been evaluated by two kinds of experiments. One of them is comprehensive and the other is partial.

The comprehensive experiment was commenced in Hijaz twenty years ago, where the *Shariah* was enforced in totality and has proved to be unprecedented success. The conditions obtaining

in Saudi Arabia prior to the enforcement of *Shariah* is a common knowledge. Peace and tranquility was unknown to the people there. The country had become proverbial for the worst kinds of crime. No person travelling through the land was safe, nor was any person secure during his stay. Things had come to such a pass that pilgrims coming from abroad to perform Hajj had to bring armed troops of their respective lands to protect their life and limb, but these troops along with the Hijaz's army were unable to maintain peace and tranquillity and protect the locals as well as the pilgrims against the onslaughts and plunder of the robbers. The law enforcing agencies were simply helpless. But no sooner was the *Shariah* enforced than the situation was transformed, the people heaved a sigh of relief, peace was restored in the land and loot and plunder came to an end, so much so that crimes became a part of history. Those who did not see the miserable plight of Saudi Arabia hardly believed it. The people no longer hear any news of crimes being committed. They are rather given the reassuring tidings of the ideal atmosphere of peace. If any one drops his purse full of money, will regain on the spot before reporting the matter to the police.

If some one drops his stick on the road, it may possibly affect the smooth flow of traffic, but nobody will pick it up. The police will arrive and take it away. Similarly if someone loses his personal effects the police will look for them and no sooner they are traced than they will be handed, over to the owner whether or not he reports the loss. Thus a small number of police is capable of maintaining peace and tranquillity which a large number of local and foreign troops could not maintain. Enforcement of *Shariah* by Saudi Arabia is a comprehensive experiment which bears testimony to the fact that the punitive system of Islam completely wipes out crimes. That is why it is exactly the system which the International Conference on law has desiderated.

Partial experiments were first made in England, USA, Egypt and some other countries. Later the punishments in question have been tried in almost all the countries of the world. There partial experiments have also met with phenomenal success. We describe them as partial because they are limited only to one punishment prescribed by the *Shari'ah* i.e. the punishment of flogging. Thus

in England the criminal and military laws provide for flogging. It has also been incorporated in the Egyptian military while in USA and certain other countries flogging has been prescribed as the basic punishment for offences committed by the prisoners. Subsequently in the wake of Second World War all the countries of the world adopted it as the punishment for hoarding, profiteering and offences resulting in the breach of peace. This is admission of the fact on international level that flogging is more effective than all the punishments and that it is the only punishment which can ensure the public discipline and obedience of law and that all the punishments prescribed in the laws in force cannot stand comparison with it. This admission on international level is tantamount to the acknowledgement of the *Shariah* as the only successful law for the extirpation of crime since flogging is one of the basic punishment laid down by it.

496. The Shariah punishment and Human Nature

In short the experiments have proved that the *Shariah* punishments are practically more effective in the elimination of crimes and produced for better results than those provided for in the operative modern criminal laws. The reason for the outstanding success of the Islamic *Shariah* is that it has kept in view human nature in laying down its punishments. Fear and hope are inherent in human nature. Man tends to do everything from utilitarian point of view. He does not do anything unless be expects to profit by it and does not refrain from doing something unless he is apprehensive of its harm. No one jumps out of a running car because of the fear of death although such an act may be profitable. But if the same person feels he will gain by jumping from a tram or horse back, he will readily do so because it does not involve the danger of coming to much harm. One is not afraid of travelling by a car as much as one is afraid of travelling by air, of riding a tamed horse as much, as of a riding restive one. He will not be afraid of going up an elevator but will be scared of climbing a step hill or cliff. Man tends to weigh the pros and cons of all that he has and when he finds that disadvantages are greater than advantages he will and wrong man commits crime because he hopes to achieve something thereby and avoids committing it

because he fears the harm ensuing therefrom. The harsher the punishments the more the people will avoid committing crimes, and the lighter the punishment the more will they be attracted by them. If we keep the crime in view overlooking the delinquent, he will abstain from guilt inasmuch as he will not nourish any hope of lenient treatment and will thus tread the right path. The *Shariah* has taken into consideration human nature and laid down punishments on its basis, in particular the punishments of *hudood* and qisas. In prescribing these punishments it has fixed its glance on the crime in total disregard of the delinquent, inasmuch as such offence are heinous and badly affect the social system. Leniency in the case of these offences would pose a serious threat to the community, while harsh treatment would lead to a decline in the incidence of crime.

The experiment of Egypt on focussing attention on the crime to the exclusion of the offenders' personality has produced excellent results. The legislative authority of the country decided to overlook the person of the offender to a considerable extent where use of intoxicants was involved. Accordingly Act No.21 of 1928 was promulgated providing for severe punishments for keeping narcotics and intoxicants. Under the Act punishment of such an offences was doubled, minimum limit thereof fixed and deferring of the enforcement of sentence prohibited. As a result of this, use and trafficking of intoxicants was remarkably reduced. The gradual decline in the incidence of this crime can well be assessed in the light of statistics: In 1926 a year before the promulgation of the above Act the offences relating to narcotics and intoxicants was 21113 in 1928-1929 it was reduced to 11404, in 1929-30 to 8599 in 1936-37 it fell down to 1922 and in 1942-43 it was restricted to 1628.

The above figures bear it out that in the case of heinous crimes overlooking the person of the offender is most effective in the elemination of crimes. The viewpoint of *Shariah* in this respect is absolutely correct. In fact the above statistics are solid and empirical proof of the cogency of the *Shariah* concept of punishment.

SECTION VI

PUNISHMENT OF EGYPTIAN LAW AND THE AMBIT OF THEIR IMPACT

497. The Kinds of Punishments

Under the Egyptian law crimes vary with punishments. It divides crimes into three kinds. The first kind consists of major offences. The second of misdemeanours and the third of contraventions. Separate punishments have been prescribed for each of these kinds. For the first kind of crimes termed as major offences various punishments have been laid down which include death penalty, rigorous life imprisonment, rigorous imprisonment for a fixed term and confinement in a jail. Punishments for misdemeanour comprise imprisonment, custody and mulct or fine and the punishment for a contravention is imprisonment and fine as well. The difference between the punishment of misdemeanour and contravention is that the term of imprisonment for the latter does not exceed seven days while for the former it extends to three years. Similarly fine for contravention does not exceed a hundred *qursh* while the fine for misdemeanour may be more than that.

Death penalty means taking the life of an offender. But in civilized countries different methods are in vogue for putting an offender to death. In some countries such as Egypt he is hanged, in France he is beheaded with a sharp weapon or instrument and in USA he is electocuted.

Acts of hard labour, whether for a fixed term or for life mean that the prisoner is put in prison on laborious jobs specified by the government (Egyptian Penal Code Article 14). If the offender is a female or a male above sixty years of age, she or he is to

complete his term in a public jail. Such a jail is situated in the jurisdiction of a province.

Jail punishment is that the convict is confined within the four walls of a prison house and is put on hard labour as specified by the government (Egyptian Penal Code, Article 16).

The minimum term of hard labour is *three* years while the maximum is *fifteen* years. It may, however, be more under a specific section (Egyptian Penal Code Article 14, 16). By the punishment of imprisonment is meant that the convict is to be confined in a central or public jail for a minimum term of *twenty four hours* and maximum term extending to *three years*. However, if a provision exists in the law for a more extensive term, it may be enhanced. Imprisonment is to be either simple of rigorous. If it is rigorous the prisoner is made to hard labour inside or outside the prison.

It may be said that hard labour for life or for a fixed term and confinement in a jail are all by nature punishment of imprisonment. They are identical in nature but different in respect of the length of time. As for the nature and rigour of labour which a convict has to undergo, it does not affect the nature of imprisonment as confinement. Looked at this the punishments for which the Egyptian law provides come to this: death penalty, confinement, custody and fine.

Until 1937 provision existed in the Egyptian law for flogging which was reserved for juvenile delinquents but it was later replaced by admonition.

The punitive law of Egypt also included expulsion for life or for a fixed period but in 1904 the provision relating there to was rescinded on the ground that on account of the modern facilities of communication this punishment had lost its efficacy. Subsequently, however, it was decided to restore punitory expulsion. In 1940 during the second world war the government was compelled to adopt such a punishment again. Besides, flogging was prescribed for the infringement of military rules and regulations, particularly for hoarding and profiteering. In the lase of hoarding and profiteering the punishment of flogging remained in force till the end of hostilities.

One of the basic punishments as provided for in the Egyptian law is commitment to reformatory, which is exclusively intended for habituals and, juvenile delinquents. The penelty also basically constitutes confinement, although the system of a reformatory differs from that of a jail.

498. Power of the Court Regarding Application of above Punishments.

The Egyptian penal code includes a section for the punishment of every offence and allowance has been made in respect of each punishment for its suitability to respective offence. Apart from death penalty and admonition almost all the punishments have two limits: Maximum and minimum. In most cases an offence involves two penalties, the one being higher than the other. The court has been allowed extensive powers in the application of these punishments. For instance, if an offence entails two punishments the court is empowered to choose any punishment between the manimum and maximum limits as it deems fit for the correction of the offender taking into consideration the circumstances of the case. The court may, subsequently change the sentence it passes and award higher penalty should the circumstances of the offender so require. But this power of the court is limited to major offences. The court, for instance, can replace death penalty by life imprisonment or imprisonment for a fixed term, life imprisonment or imprisonment for a fixed term or punishment of confinement in a jail by imprisonment. (Article 717 Egyptian Penal Code).

The committing judge is vested with the powers to transfer some cases of major offences to a court of misdemeanour so that sentence of imprisonment may be passed instead of awarding punishments prescribed for major offences for imprisonment is actually the penalty for misdemeanour. if conversion of major offences into misdemenours by the committing court is based on specified legal grounds or on circumstances requiring a sentence intended for misdemeanour then there is no curb on the exercise of such a power by the court provided that the offence involved does not entail penalty or hard labour for life. The result of conferring this power to the committing court in effect is the

replacement of the punishment prescribed for a major offence but confinement in a jail or of life imprisonment with hard labour by imprisonment for a fixed term. This practical result is in tune with the outcome of the punishments laid down in article 17 of the Egyptian Penal Code. In case the term of imprisonment does not exceed *one year* the court may defer the enforcement of such punishment taking into account the behaviour of the offender, his antecedents, age and other circumstances if it is satisfied that the offender will not break the law again. (Article 55, Egyptian Penal Code).

499. Reason for Conferring on Court Such Power

The legal experts were obliged to provide wide powers for the court because although they are endeavouring to formulate a practical theory of punishment they are unable to harmonize those contradictory elements on which such a theory is to be based. Hence in order to solve this problem they have preferred to include the matter in the function of the court so that it may reconcile the conflicting elements by taking into consideration various principles and all the provisions of the law without losing sight of any aspect of the problem. Thus it becomes obligatory for the court to take into account the seriousness of the offence, its possible impact on the society, the peculiar circumstances of the offender and those in which the offence is committed and relations of the offender with the victim as well as the possibility of his reconciliation with him. Keeping in view all these factors if the court feels the circumstances of the delinquent and public good demand that the person of the offender should be disregarded, it may do so and award a harsh punishment. But should it feel that the circumstances of the delinquent require lenient treatment, it may deal with him provided that leniency does not prejudice public good.

It might have been expected that the courts would succeed in translating into practice the general theory which the experts have failed to formulate since the courts deal with the people individually without being prejudiced by the circumstances whereas the experts have to formulate, keeping in view all the factors and circumstances at once such general rules and regulations as may be enforced in a uniform manner.

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The question arises; Have the courts come up to the expectation? Have not the courts too failed like the legal experts? The test of success or failure is the extent to which the crimes have been eliminated and the delinquents have been prevented from committing the offences. If we examine the yearly statistics relating to incidence of crime, we shall learn that the courts have failed in the performance of their function just as the legal experts have.

500. Reason for Court's Failure in Application of Theory of Punishment

The expectations of those who were optimistic about courts' ability to apply the theory of punishment successfully have proved to be a forlorn hope The truth of the matter is that legal experts failed in formulating an ideal doctrine of punishment because they wanted to combine all the contradictory elements and bring them to bear on the application of punishments all at once. Besides the courts were required to take into account all conflicting elements without exception in dealing with every offence. Obviously no court can simultaneously keep in view the seriousness of an offence and the circumstances requiring mitigation of punishment at one and the same time, for whenever a judge takes into consideration the circumstances of the offender, he will have to reduce the severity of punishment necessitated by the heinousness of offence and consequently award a lighter punishment suited to the circumstances of the offender. Due to the decision thus arrived at by the court the offender will escape a harsher punishment and such a decision on the other hand, will be prejudicial to peace and tranquillity in the society. Consequently the culprits will be encouraged by the lightness of punishment and the incidence of crime will rise enormously, posing a serious threat to the security of the community and the very punishment which is intended to ensure peace and tranquillity, will on account of misapplication become the cause of evil and corruption while the court would be helpless because of legal restrictions.

If the law provides for mitigation of punishment to which an offender is liable, in view of his circumstances can an offender have grounds to claim such a mitigation in any crime that is

heinous in the superlative degree? Some-times the offender is young, sometimes he is an old man, sometimes he is compelled to commit the offence by the demands of honour and decency and some times he commits it in the heat of emotions, some times powerful motives are at work behind a criminal act and sometimes political and national motives drive him to commit offences. Such are the multitude of pleas with which the offenders and their defenders are armed. Should the court turn a deaf ear to their pleas? Should it not have pity on any one, should it not consider the circumstances of the offender, their coherence and the commendable way they are presented? No doubt the law permits the court to take into account the circumstances of the offender but does not compel it to do so. This justification for keeping in view the person of the offender ceases to be a justification and assumes the character of obligation. The result of acknowledgement of circumstances necessitating commutation of punishment and its legal impact would be that the court is to accept right of the offender to the admission by the court of the circumstances calling for mitigation. Obviously no court can overlook this right nor can it do anything to the prejudice of the offender's defence.

In short the concept of the legal experts that the courts will succeed in the application of the idea of punishment as they deal with offenders individually has proved to be incorrect. The courts do deal with circumstances of the offenders individually but they do so on the same basis as the legal experts themselves kept in view i.e. the offence and the offender both have to be taken into account simultaneously.

If the legal experts do not sacrifice the one for the safeguard of the other, the courts too, do the same. They cannot ignore either aspect of the case with the result that they abandon both, and the security of the community is at the same time jeopardized.

In allowing wide powers to the courts the legal experts have lost sight of the fact that the judge is after all a human being and that human being instinctively seeks escape from responsibility. Now if man is given option among several responsibilities he would prefer a lighter one. He is constrained

to accept heavy responsibility only when there is no other alternative. The judge is not exception to this rule. He feels death penalty as lying heavy on his conscience and tries to evade passing the death sentence. He refrains from passing such a sentence as long as he can commute it into life imprisonment. Similarly if, he can commute rigorous imprisonment into simple imprisonment, he regards the former as something that his conscience forbids. The judge, for example, feels disinclined to award punishment of imprisonment and passes the sentence on grounds of person's circumstances, whereas he does not feel so disinclined when he passes the sentence but suspends its enforcement. Similarly the judge does not feel reluctant when he passes a sentence wherein he has no power to change the punishment or to mitigate it. This is not exclusive case with a judge. It is simply the demand of human nature, which is not amenable to change so long man remains what he is. If man is expected to violate the demands of nature,, he will be expected to do the impossible.

501 Failure of Legal Experts in Finding Solution to Problem of Punishment and Unmistakable Manifestations thereof.

From what has been stated above it is clear that the experts have failed in finding a judicial solution to the problem of punishment. There are two manifestations of the failure, whose importance and effects are evident.

1. Suspension of Basic Punishments

As the result of the full powers conferred on the courts to choose or alter the punishment of a crime the basic punishments have come to be suspended to the degree of recision. As has already been seen the court abstains from awarding severe punishment as long it can choose a lighter one and does not award a basic punishment as long as it is in a position to award a precautionary one. This position of the court is seldom affected.

There are some twenty offences punishable by death, but death penalty is seldom awarded for such offences. One of them is homicide for which the offender' is condemned to death. But daily cases of homicide are rare. Five out of nine cases are those

of murder proper, while four are attempted murders. In 1936-37 3093 murders and attempted homicide occurred and in 1938-39, 3211 such cases took place. In other words despite being a heinous offence its incidence is on the increase. The growing cases of homicide call for strict application of capital punishment. Besides, the very fact that homicide is a heinous crime calls for most severe punishment, whether or not other factors warrant it.

But it is unfortunate that statistics do not always conform to logic and reason. They tell us that the incidence of homicide is progressively on the increase and in spite of this deterrent decisions of the courts are consistently dwindling. In 1936-1937,[1] for intense, the criminal courts passed sentences in 138 cases of homicide while the number of accused involved was 222 out of these only seventeen people were condemned to death. Death penalty of the rest was commuted. In other words, in cases liable to condemnation only 8.8 % offenders were condemned to death. In 1938-39, the criminal courts announced sentences in 150 cases of homicide, while the number of killers involved was 906. Only nine were awarded death penalty while the capital punishment of the rest was commuted. Thus the percentage of condemned offenders stood at. 4.3%. Again, in 1939-40 one hundred and thirty eight cases of homicide involving capital punishment were decided, while the number of accursed was 195. Only six of these were sentenced to death. Capital punishment of others was commuted. Thus in cases liable to death penalty, only 3.1 % were condemned.

During the above four years the percentage of death sentences stood at 5.9 % which, insignificant as it is, indicates that the number of such sentences is extremely limited, although in the case of homicide and other heinous crimes concerned death penalty was obligatory.

It will be wrong to think that the figures relating to death penalty had been greater in the past. In fact, in 1926-27 the percentage of death penalty had been 5.7% and later it came down to 2.9%. This is so small that disorder would set in and corruption could reign supreme in the society. The framers of law might not have the slightest idea that such could be the

1. All these statistics have been taken from the Annual Figures issued by the Ministry of Justice. Only the percentage has been worked out by the author.

result of changing severe punishments into lesser ones, otherwise they would not have provided for commutation.

It follows from the foregoing statement that although death penalty is written on the statute book yet virtually it lies suspended, and reality gives the lie to it.

What is true of death penalty also holds good in the case of rigorous life imprisonment, This punishment is awarded in lieu of death penalty but actually it is not enforced.

For example in 1936-37 the total number of convicts sentenced to life imprisonment with hard labour stood at 114. Out of these nineteen got life long hard labour, as the substantive punishment and the rest were sentenced thereto in lieu of capital punishment. In 1937-40 the number of offenders sentenced to rigorous life imprisonment was 121. Forty eight of them got it as substantive punishment while the remaining were awarded this punishment as the commutation of death penalty. In the following year 114 offenders in all were sentenced to rigorous life imprisonment but only 33% of them were sentenced thereto as substantive punishment and the rest were condemned criminals getting commutation. Similarly in 1939-40 the number of such prisoners stood at 123. The punishment of only 31 of them was substantive as opposed to the rest whose death penalty was commuted into hard labour for life.

Apart from murders unrelated to circumstances and attempted murders punishable by death, the criminal courts have seldom awarded rigorous life imprisonment. In respect of other offences too, the sentences to lifelong hard labour have been passed in a very limited cases. Thus in 1986-37 and 1939-40 rigorous life imprisonment was awarded only for homicide and attempted murder besides five cases which involved larceny.

The percentage of life imprisonment with hard labour as substantive punishment for murders unrelated to circumstance stood at 7.8 in 1936-1937, at 15.8 in 1937-38, at 8.9 in 1938-39 and at 12.9 in 1939-40 respectively. The overall percentage for these four years comes to 11.3.

However, it is not easy to give the rate of incidence of attempted murders, inasmuch as only an epitome of statistics

relating to cases is provided and no details are given as to the crimes for which rigorous life imprisonment to be awarded.

But we presume that the proportion of such punishment is even less than that of death penalty. For instance, in 1936-37 charges of attempted murders against 438 offenders were established but only four of them were given hard labour for life.

As for larceny, proportion of life imprisonment with hard labour is almost nil. For instance 128 offenders were liable to hard labour for life in 1936-37, but none was sentenced thereto. In 1937-38, cases of one hundred twenty four offenders were decided, whereof only two were given life-long hard labour as substantive punishment and the sentence was accordingly enforced. Thus the proportion of this punishment for larceny comes to 1.6% only. Again, in 1938-39, 147 thieves were awarded penalties. Of these only three got rigorous life imprisonment as substantive punishment. Thus the proportion of punishment for the year comes to be 2%. In the following year the total number of persons who were found guilty of larceny were awarded punishment. None of them, however, was given hard labour for life. In short, the overall figures show that for the offences of larceny the proportion of life imprisonment with hard labour as substantive punishment stands at 0.9%.

Just as capital punishment and life imprisonment with hard labour have remained virtually suspended and have not been awarded for the crimes they were provided for, so has it been the case with rigorous imprisonment for fixed terms and simple imprisonment, since the cases for which these punishments are awarded are generally transferred to the court of misdemeanour in view of the legal grounds claimed by the accused and his circumstances necessitating commutation so that they may be decided on the basis of misdemeanour. Such cases are nearly half of the total number, which means that this constitutes one third of total number of offences involving rigorous imprisonment for fixed terms and simple imprisonment as substantive punishments.

The cases assigned to criminal courts are of two kinds. The first kind of such cases consists of those involving capital punishment or rigorous life imprisonment wherein the circumstances

of the offender sometimes call for commutation and sometimes do not. The second kind comprises those cases involving imprisonment with hard labour for fixed terms and simple imprisonment wherein according to the committing judge the circumstances of the accused do not call for commutation and therefore logic demands that the accused are to be awarded substantive punishments. But events do not fulfil the demand of logic since in such cases mostly simple imprisonment is awarded. The figures indicate that in 38% of such cases simple imprisonment is given in lieu of substantive punishments.

The circumstances necessitating commutation are always apparent to the court, although they may not have come to knowledge in course of investigation. Besides, they present themselves to be deserving commutation.

We now try to ascertain the percentage of punishments for all offences, whether awarded by Criminal Courts or Court of Misdemeanour. In 1936-37 the criminal courts sentenced 3063 offenders to punishments involved in 2482 offences. Out of these 941 were awarded punishments for misdemeanour. The same year 1416 persons were awarded punishments by the Court of misdemeanour involved in 11504 offences. Thus the total number of offenders against whom sentences were passed stood at 4479 out of whom 2357 were given punishment of misdemeanour. In other words for 52.6% crimes punishment of misdemeanour was awarded in lieu of substantive punishment. In 1937-38 criminal courts awarded punishments of misdemeanour to 2935 offenders involved in 2408 cases and the same year the court of misdemeanour sentenced 1326 people involving in 1045 cases to the punishment of misdemeanour. In other words, the number of offenders sentenced to punishments for crime proper was 2103, while that of offenders getting punishment of misdemeanour was 2194. This means that in 51% cases of crimes the punishment of misdemeanour was awarded in lieu of substantive punishment. In 1938-39 this percentage was 49.7% and in 1939-40 it stood at 49.6%. Thus the overall percentage for all these years comes to 50.7%.

In short, Capital punishment is awarded for only six of the crimes for which such punishment is prescribed. Rigorous life imprisonment is not given in some cases as substantive punishment

and the proportion of the rest of the crimes for which such punishment is awarded as substantive penalty is only 11.1% The percentage of offences for which hard labour for fixed period and simple imprisonment are prescribed comes to 35% inasmuch as half of them consist of misdemeanour and remaining 30% are decided under the provision providing for punishment of misdemeanour.

The import of all this is that rate of application of punishments has fallen by one or two degrees, for capital punishment is replaced by rigorous life imprisonment, and rigorous life imprisonment by hard labour for fixed terms and simple imprisonment and these punishments in their turn by confinement. Thus we that substantive punishments have come to be suspended. What is the extent of this abeyance and what is its significance?

Second: Inclination Towards Commutation

It has already been mentioned that the law provides for two limits of every punishments; the maximum or the most servers and the minimum or the lightest. The courts have been vested with the powers of determining any punishment between the two. But what actually happens is that courts are inclined to award lighter punishments and because of the factors at work already explained, they choose the least severe ones.

The proof of this inclination is provided only by official Statistics[1].

In 1936-37 rigorous imprisonment for fixed terms was awarded to 1165 offenders. The least of these terms was three years which was gives to 33.2% offenders. Offenders getting 10 to 15 years terms comprised 15.4% and getting 3 to 10 years or onwards comprised 15.4%. The same year 744 offenders were sentenced simple imprisonment. Those getting the minimum term of three years were 58%, ten to fifteen years were 1.8% and those getting 3 to 10 years or more 40.2 %. Again, during the same years 40090 offenders were sentenced to rigorous imprisonment. Out of them 56.3% got three months terms or less, 33.4% got 3 months to 1 year and 10.3% got more than a year. The same year 23925 persons were sentenced to simple

1. These statistics have been taken from the Annual Reports of the prisons while the percentage has been worked out by the author.

imprisonment. Those who got three months or less comprised 90.6% while those who got more than ninety days comprised 4%.

Again, in 1938-39 out of the total number of those sentenced to fixed terms of hard labour, the convicts with minimum term comprised 48.9%. Those with ten to fifteen years were 13A% while those getting less than ten years and higher than the minimum terms were 37.7%. During the same year 69.3% got minimum punishment of simple imprisonment, 1.6% ten to fifteen years and 29.1% got between minimum and maximum terms. This year the proportion of those sentenced to rigorous and simple imprisonment was the same as the previous year. These figures are clear testimony to the fact that the courts are reluctant to award severe punishments and tend to prefer lighter ones.

It should also be borne in mind that by awarding lighter punishment in lieu of substantive punishment, the punishment is already commuted. In other words the courts commuted punishment twice. First when choosing the punishment accepting circumstances necessitating commutation and secondly when determining the quantum of punishment and passing the sentence.

502. The Reason for Commutation and Suspension of Punishment.

We have learnt from the foregoing statement how the punishment come to be suspended and how the courts tend to mitigate punishments. The reason for both these phenomena is the same. The law has provided for punishment for the purpose of correction and deterrence on the one hand and has on the other acknowledged the impact of the offenders' circumstances on the punishment to be awarded to him by admitting the importance of his person and has thus made it obligatory for the court to take into account both the principles at once when awarding punishments for both heinous and minor offences. It does not disregard the person of the offender in dealing with heinous offences affecting the community as does the Islamic *Shariah*. Now the two principles mentioned above are contradictory. Correction and deterrence require severity of punishment and consideration of the offenders person demands mitigation of punishment. The court is unable to remove this discrepancy. It can, however, accommodate

the two principles as far as possible and in doing so it always tends to decide in favour of the offender, for the offender present in person entreating mercy, imploring for leniency by describing his circumstances and justifying his viewpoint whereas the public good does not present itself with equal emphasis. That is why the court does not keep in view the public interest as much as it does the offender's interest. The result is suspension of punishments and commutation.

503. Are the Punishments of the Penal Code Successful in the War against Crime?

Punishments are prescribed in order to weed out criminals and eliminate crimes. When the law prohibits an act, it provides at the same time for a quantum of punishment for the commitment of such an act, which it considers a guarantee of making the people refrain from being guilty thereof. If the punishment so prescribed serves the purpose of preventing the people from doing the prohibited act, the punishment obviously is successful and if it can not, the ruler or the authority lays down harsher punishment which can ensure prevention of the incidence of crime.

In other words, the test of the efficacy of punishment is the effect it produces on the criminals. If the incidence of crime and the number of criminals diminishes the punishment is successful but if does not, then its replacement by such punishment is imperative as is efficacious enough to make the criminals desist from committing the offence.

The Egyptian law prescribes death penalty, rigorous life imprisonment, hard labour for fixed terms simple imprisonment and confinement for various offences. It is to be seen how far these punishments are successful and what effects do they produce on the incidence of crime and on the offenders. Despite their diversity the above punishments are actually two punishment death penalty and imprisonment.

504. Death Penalty

No doubt death-penalty is preventive punishment. It is prescribed for a small number of offences and does not practically apply to offences other than capital crimes. Keeping in view

relevant statistics it has been shown that the offences for which death penalty is laid down constitute only six percent of total crimes. This is too small a proportion and as such may even incite commitment of offences rather than prevent them. Those who have to deal with judicial business know that today's killer does not care for pleading guilty after committing the offence. He rather concentrates on his defence and seeks to have lenient treatment so that he may brazenly escape capital punishment. He generally succeeds in achieving his end.

I cannot understand how we accept the pleas of callous killers who turn a deaf ear to the entreaties of the victims. How is it that we have pity on those who have no pity on the victims? When a killer takes the life of some one he does not have the slightest pity and he commits homicide under a premeditated scheme. The question arises as to what are the factors and circumstances that necessitate leniency and magnanimity? The law itself draws lines of distinction between premeditated murder committed by lying-in-wait, by combining it with other offences, by committing it to facilitate other crimes and the homicide committed at random and unwittingly. The law provides for capital punishment in the first kind of homicide (i.e. the cases of intentional murder) and rigorous imprisonment for the second kind. How then, have we come to treat both these matters at par? How is it that we have limited the capital punishment to a narrow sphere by treating leniency as warrantable? In 94.1% cases wherein the offender does not deserve any pity, he is regarded as meriting leniency and mercy.

The proportion of homicide in all the offences committed each year is 35% and its incidence is on the increase. Thus is 1935-36, 285 murders and attempted murders were committed in the total number of 7976 crimes. In all 1936-37 out of 8618 offences committed in all 3093 were murders and attempted murders. The overall figure of offences of crimes in the following year were 9232 out of which 3319 were murders and attempted murders. Obviously, leniency with the offender accounted for the increase in the incidence of homicide.

This flaw in the capital punishment is not intrinsic but owes itself to application thereof. It comes into play because in

cases of even heinous offences affecting the public good and resulting in the individual's death, circumstances necessitating commutation of punishment are taken into account. Had the acceptance of such circumstances been forbidden or had it been forbidden only in the case of homicide or had the court not been empowered to commute capital punishment, this punishment would have served the purpose of reducing the incidence of homicide and a dangerous aspect of criminal problem would have been solved.

505. Punishments of Imprisonment and Their Drawbacks.

Hard labour for life and fixed terms as well as simple imprisonment and confinement in reality constitute the substantive punishment of imprisonment whose difference in respect of the lengths of time is far greater than in respect of their nature. The punishment of imprisonment is actually the substantive punishment of a majority of offences. It is awarded to the offender who commits an offence for the first time as well as for the unmanageable and habitual offenders. It is awarded to women, men, young and old people alike. Those guilty of heinous offences as well as those involved in minor ones are equally sentenced to imprisonment. The application of this punishment thus has led to serious consequences and given rise to complicated problems which are as follows:

(1) Burden on Public Exchequer and Reduction in Production.

The offenders sentenced to imprisonments of various kinds live in jails till the expiry of their terms. These jails have different names and are of different grades. The first grade consists of central jail in which convicts with terms of three months or less are kept. The second grade consists of public jail meant for people with more than three months terms and elderly males and females sentenced to rigorous imprisonment. Third grade jails are those prisons to which convicts with rigorous life imprisonment and hard labour for fixed terms are committed. There are also reformatories intended for male habituals. For young offenders separate reformatories exist wherein convicts above seven years of age are kept.

The number of offenders who were convicted of various offences in 1938-39 was 127090. This figure does not include those convicted by the central courts, whose number increases each year. In 1937-38 the daily average number of prisoners stood at 25515 as against 5974 during the previous year.

The prisoners are generally healthy and able-bodied. Keeping them in jails means to waste their capabilities and prodigious powers of labour. If they are awarded punishment other than imprisonment the society would benefit from their capacities and labour on the one hand and such punishment will be enough to reform and correct them on the other.

Doubtless, there are punishment which can be effective means of reformation and admonition and result in the eradication of crime. One of such punishments is flogging, which does not affect the offenders' productivity and daily output.

The prisoners' productivity is, no doubt, exploited in jails. But only a small number of inmates are put on useful jobs. Other inmates are fed, clothed and provided medical treatment at government's expense. Thus they live their lives in vain.

In 1938-39 the Egyptian government spent 862125 guineas (21 English shilling) on jails. The income occurring from the prisoner's labour amounted to 150000 guineas, thus government had to incur 712125 guineas on jails. If the deficit caused by the confinement of young people is included in this amount, the total deficit the community has had to bear annually comes to 2582285 guineas assuming that the annual output of each prisoner is equal to twenty-four guineas.

(2) Inmates' Corruption

Had the punishment of imprisonment proved an effective means of reforming the inmates of prisons, the society would have readily borne this huge deficit. But in reality the inmates are not reformed by the punishment of imprisonment. On the contrary their criminal disposition is aggravated by it, for inmates consist of all sorts of criminals including habituals, offenders with different criminals specialties as well as those who are not criminals in the real sense of the word but are treated by the law as such, for example one who is held for keeping unauthorised

arms or for failing to sow the prescribed quantity of wheat or one apprehended inadvertently. The result of living together in the same environment is that the germs of guilt spread among all of them. The offender who is past master of committing crimes reveals the secrets of his trade to the innocent inmate and uses him as a tool. Consequently the innocent inmates come out of the jails with crime having taken root in their minds.

It has been learnt from experience that when a person is held for an act which is no offence worth the name such as keeping unauthorised arms, he hates the criminals before going to jails and shrinks from the very idea of belonging with them. But when the same person is released from the jail the germ of crime is already rooted deep in his mind. He does not only adopt the criminal way of life but actually prides on it. That is why courts are reluctant to pass sentence of imprisonment for offences of relative nature, which do not have criminal spirit and in case the offender is a beginner, he is condoned even if he is found guilty of a real offence, inasmuch as the courts fear that should the beginner or innocent person be committed to prison he will turn into a professional criminal.

The jail, in short, is not an institution where the criminal could be set right. In fact it is a training school for the criminals.

The government is alive to the complexity of this problem and is endeavouring to solve it. But the lines on which reformation is sought suggests that it is not an effective remedy, for the official mode of thinking is to divide the jails on the basis of the nature of punishment and classify the offenders on the basis of their age groups. But such a classification is not likely to affect the prevalent situation. The reason is that all the offenders getting identical punishment will gather together, of whom some will be beginners with little knowledge of crimes and some habituals and experienced criminals. Their indiscriminate mixing up would produce the result whose question of remedy poses the present complex problem. It is also no solution to the problem to keep young people in the same jail and people advanced in age in a separate jail, for Statistics show that majority of the offenders consist of young people. For example, in 1938-39 the number of young criminals was 55277 and this amounted to 66% of the

total number of prisoners. Out of these 15050 were aged between sixteen to twenty years and the rest were 33 to 23 years. In other words the number of young prisoners was greater than that of the old ones and the association of the youths with experienced culprits suggests that former must have been steeped in the ways of the hardened criminals.

(3) Lack of Preventure Factor

The punishments of imprisonment has been prescribed under the impression that it is a preventive penalty but as a matter of fact it has proved fruitless. It does not produce any salutary effect on the minds of the prisoners. Those who are sentenced to rigorous imprisonment come out of jails as habituals, well conversant with the techniques of crimes. Has it been of any good, the convicts would not have been guilty of crimes again and again soon after being released.

We learn from the jail statistics that in 1938-39 forty-five percent of the convicts committed offences again within a period of fifteen days to one year, while 43% of those committed to reformatory were guilty of crimes again. This was notwithstanding the fact that admission to reformatory is the most preventive of all punishments and the offender is released from it only when sufficient proof exists for the release of the inmate and for tendency to lead normal life as a useful citizen. The above statistics also tell us that one-third of the inmates of reformatory consists of those who return twice and thrice to the institute.

The figures released by the jails also show what impact is made by the jail life on the minds of offenders. For example in 1938-39 the number of the reformatory inmates consisted of such offenders who had already committed crimes five to ten times, one third of those who had committed them ten to fifteen times and the rest as many as fifteen to forty times. Had the jail life served a deterrent to crimes the offenders would never have committed them ten, fifteen and forty times.

The same figures, again indicate that the number of such reformatory inmates is progressively on the increase as had already lived there. Thus in 1916 re-entries were 10.8%, in 1926, 20.6% and in 1936 it swelled to 38.7%.

The annual increase in the number of habituals bear testimony to the fact that imprisonment produces hardly any result in the efforts to reform the offenders. For instance in 1935-36 the number of repeated offences stood at 872, in 1936-37 it was 939, and the following year it rose to 1023. Obviously such offences are committed by those habitual criminals who had already committed several offences.

(4) Loss of Sense of Responsibility

In addition to the fact imprisonment is not a deterrent punishment the worst thereof is that the prisoners lose all sense of responsibility and make them fond of idleness. Many prisoners spend long years in prisons, where they exult in idleness and enjoy various facilities at the expense of the government such as meals, clothing and medical treatments. It has been observed that after coming out of the jail these people do not feel like doing any work. They are completely torpid with sense of responsibility and no sense of duty towards their families. Soon after their release they commit not only because they are accustomed to committing them but also because they are desirous of returning to indulge in the pleasures of idleness.

(5) Increase in the Power of Criminals

Offenders released from the jail are a drain on the community. They terrorise the people by the crimes committed by them in the past and succeed in robbing them by frightening. Thus they live by generating fear and acquiring goods and money by unlawful means. They are not interested in decent and legitimate source of income.

The power of the dangerous criminals has overwhelmed today the law-abiding citizen to such an extent that it rivals the power of government itself. It is also common knowledge that the government uses the services of these criminals during electioneering campaigns in order to coerce the voters of different parties into a particular direction.

The important place the criminals have thus acquired imbibes in the young people an inclination for criminal behaviour. They naturally tend to secure for themselves an important place, and it is in this way that the importance of the offenders has made

its impact on this mass psychology. Hence crimes, which were formerly despised, have now come to be a means of pride and honour, and the criminals who were formerly hated have now come to acquire the position of powerful and honourable persons. They are a power to reckon with in the present day society.

(6) Decline of Standard of Health and Morality

As the result of the enforcement of imprisonment healthy males are confined together at the same place for different periods, where they live deprived of freedom and separated from their wives. The number of prisoners increase annually but the rate of increase in the jail facilities does not keep pace with it with the result that the jail administrators are compelled to cram the prisoners up in the rooms like sheep and cattle. Things have come to such a pass that the number of inmates actually confined in jail and lock-ups is generally three or four times higher than the number determined on health grounds.[1] There are generally two rooms in a central jail. Six persons are kept in each cell. The health facilities provided in the public jails are lacking in the central jails. Prisoners in the whole of Egypt are not provided with even the mats or beds to lie on. They complete their terms sitting all the time and sleeping on the ground. They are not given any sheets either, to cover themselves with.

The result of overcrowding the prisoners in the jails and depriving them of their wives company is that they fall a prey to various venereal, skin and chest diseases. The statistics for 1939 relating to the public prisons and jails indicate that 3993 inmates were suffering form bronchitis, 369 from TB, 422 from gonorrhea, 1160 from syphilis, 4168 from scabies, 1534 from barber itch, 5333 from other skin diseases, 219 from carb lice, 861 from tumours and pimples and 926 from rheumatism. Thus in 1939 seventy-four thousand prisoners contacted or developed various maladies. The above figures and the kinds of diseases tell us that the prisoners standard of health and morality deteriorates in the Egyptian jails. In other words the jails are responsible for the spread of diseases among the inmates, deterioration of their morality

1. These statistics have been taken from the Annual Reports of the prisons while the percentage has been worked out by the author.

and for their masculine potentials. The evils resulting from the punishment of imprisonment are not confined to the prisons. They exert their influence outside the jails for, the wives, daughters and sisters of the prisoners corrupt under pressure of necessity.

(7) Rise in the incidence of crime

Varieties of the imprisonment punishment have been prescribed with a view to eradication of crime, but the statistics show that the incidence of crime is progressively on the increase each year. This is a situation which calls for serious consideration. For example in the year 1906 the number of crimes committed stood at 3586, in 1912 it rose to 4008, in 1918-19 to 67793 in 1926-27 to 8012 and in 1938-39 it swelled to as many as 9286. Added to this are the 3281 misdemeanours committed in 1906, the incidence whereof rose to 93743 in 1912, in 1926-27 to 167677 and in 1938-39 it swelled 382828. During these thirty two years the incidence of crime increased three-fold and that of misdemeanours as much as eleven times.

It may be said that increase in misdemeanours is of no consequence because such punishable contraventions of the law are normally on the rise annually and therefore the number of misdemeanours must inevitably increase. This is of course true to a certain extent. Hence we ignore the problem of the contraventions and take the offence of larceny as the gauge for the determination of the incidence of crime with accuracy.

Thus in the year 1939, 65587 thefts were committed as against 54326 in 1926, 44110 in 1916, 23834 in 1912, and 15993 in 1901 in and 9356 in 1891. This means that during the span of forty eight years the incidence of larceny increased seven folds. Such all increase cannot be justified on the grounds of increase in population nor can any other excuse be offered, for population did not increase even two fold as against seven fold rise in the incidence of larceny. How can, then, increase in the cases of contraventions of law and crime by seven times and three times respectively be explained? Whatever else may be said with regard to the economic factor, I would assert that this factor cannot lead to rise in the incidence of crime if punishments are really preventive. This is evident from the situation obtaining in Hijaz. No doubt,

the social and economic situation of Egypt is much better than that of Hijaz, but the incidence of crime in the latter is less than the former. Peace reigns supreme in Hijaz as opposed to Egypt where disorder prevails. There was a time when disorder, chaos, high incidence of crime terrorization of the pilgrims and law-abiding citizens in Hijaz was proverbial. Perhaps the socioeconomic conditions of old chaotic Hijaz was not much different from what it is now. Keeping this fact in view, the difference between old and new Hijaz is similar to that which now exists between Hijaz and Egypt. This difference is manifest in the fact that the punishments in operation in Hijaz are preventive and these were not formerly awarded in that country nor are they awarded in the present day Egypt. It is because of the preventive and deterrent punishments, there is complete peace in Hijaz, where people have got rid of robbery and plunder and tranquillity of the country serves as a model to the rest of the world. If a traveller drops or loses something on the way the public recovers it for the owner, even if the matter is not reported.

In view of this practical instance it will be wrong to attribute the upward trend in the incidence of crime to socio-economic conditions or explosion of population. Crime is a disease and its remedy is punishment. The disease will be rooted out or at least its severity will diminish if the ruling class succeeds in providing the right treatment. If they fail to have access to the right remedy, the disease will aggravate and assume serious proportions and the community will have to bear its dire consequences.

506. How to Get Rid of the Drawbacks of the Prevailing Systems

We have dwelt on the demerits of the punishments prescribed by the present legal system and have come to the conclusion that these punishments are sheer waste of time and energy and result in the deterioration of morality and health of criminals, destroy peace and tranquillity and spread disorder and chaos in the society, undermine the dignity of the government and strengthen the hold of anti-social elements on the law-abiding citizens. The only way to avoid all these dire consequences of the modes of punishment in vogue is to change the whole way of life. But people are not prepared to effect any change in the system unless they have a

better system to substitute for it. We assert that we have such an excellent system to offer which has not been introduced to mankind for the furtherance of its welfare. This system is no other than the Islamic order which provides every kind of safeguard to the society and does not only protect it against crime but also reforms the criminals. The Islamic system has also proved in practice to be the most effective in the elimination of crime.

The Islamic system has not only proved a success practically but the basis whereon it is established guarantees that it would eliminate the faults and drawbacks that characterize the modes of punishments in force and save the mankind all the expenditure incurred and the efforts made by the world today for making amends for the harmful effects of these punishments.

The first drawback of prevailing legal system is that it suspends the substantive system and mitigates it. The *Shariah,* on the contrary, lays down the prescribed punishments with determined quantum for heinous offences which have bearing on the society. The courts have no powers to make any change in such punishments by increasing or mitigating them, for in the case of heinous offences the *Shariah* keeps public interest above all other considerations. As for the offences that do not affect the society, the *Shariah* authorizes the court to take into account the person of the offender, and should he be considered amenable to reformation, commute his punishment in view of his circumstances warranting commutation.

Another element of the prevalent legal system is that in most criminal cases it prescribes such punishments as are substantively identical, i.e. imprisonment. The only difference in the various kinds of this punishment is the degree of severity. The result of enforcing this punishment is that healthy people endowed with energy and power to work hard are confined in jails and unproductive expenditure is to be incurred upon them causing the nation two fold loss: Vain expenditure on keeping them in jails and wasting their labour force. If the Islamic system is enforced, the nation will be immune from all the damages caused by imprisonment for the Islamic punishment of *hudood* and *qisas* do not include this punishment. As has been shown above, the crimes involving *hudood* and *qisas* constitute thirds of

the total number of offences. Apart from these, the *Shariah* prefers flogging to imprisonment as *ta'zeer*. It does not prefer imprisonment to the former unless it is awarded for indefinite period so that the offender may be cast away from the community and the community may remain safe from his wrong-doing till his death. Besides the punishment of indefinite imprisonment is awarded to habituals in cases of heinous offences. Supposing in the case of the remaining one third of the offences, flogging is awarded for fifty percent it must be admitted that punishments of imprisonment, banishment, fine, and several other *ta'zeers* will be distributed among the remaining fifteen percent. What this means is that offences involving lashes are heinous *ta'zeer* offences and the remaining offences for which punishments other than lashes and indefinite imprisonment are awarded generally constitute minor crimes. For such offences exhortation, admonition and fine are sufficient punishments. The outcome will be that imprisonment is awarded in only 5% of all the criminal cases. Such a result can be arrived at only when the Islamic concept of punishment is translated into practice.

When the offences for which imprisonment is awarded are reduced to such a degree there will be phenomenal decrease in the number of prisoners and thus the problems of indiscriminate mixing up of prisoners and of the resultant evils, including deterioration of the inmates' health and the spread of crimes will also be resolved. Besides, repetition of offences, too, will decrease inasmuch as the association of prisoners at the same place invites them to commit offences again.

Again, such offenders as are not dangerous will be sentenced to imprisonment in very small numbers for limited terms. It follows that the germs of evil and corruption are not likely to multiply. Even if evil and corruption do ensue from limited terms of imprisonment they will not be so dangerous as to affect offenders or distrub peace and tranquillity, for the prisoners will be limited in number and will not be dangerous ones. Moreover, the same offenders will not necessarily be sentenced to imprisonment again. As for the dangerous offenders whatever the nature of their crimes, the *Shariah* provides for them imprisonment for indefinite period, inasmuch as if a habitual criminal commits even a minor offence,

it means that the criminal tendency persists in him and previous punishments undergone by him have been to no avail.

Yet another demerit of the modes of punishment in vogue is that the criminal loses sense of responsibility and develops a liking for idleness. He desires to live by extorting money from others rather than by the sweat of his brow. The *Shariah* provides a remedy for this. It is the punishment of flogging which debases the offender in his own eyes and shuns from committing the crimes again. He is also degraded in the eyes of others as well and therefore the people are not afraid of him. They do not regard him as dangerous and so powerful that the government cannot lay hands on him.

If we take stock of the flaws inherent in the punishments laid down by the laws in force we would realize that the application of the punitive modes prescribed by the Islamic *Shariah* offer effective remedy for the drawbacks of the above punishments.

We have now learnt how the modes of punishment in force undermine morality and damage health and badly affect peace and tranquillity. On the contrary the Islamic punitive forms are free from such drawbacks. In fact they are a sure remedy for them. Is it then possible for anyone to prefer the modern laws to the Islamic *Shariah?* If anyone does, we have but to cite the following divine decree:

> "For indeed it is not the eyes that grow blind, but it is the hearts, which are within the bosoms that grow blind."
>
> (22:46)

CHAPTER IX

MULTIPLICITY OF PUNISHMENTS

507. Multiplicity of Punishments and Multiplicity of Crimes.

Punishment multiply side by side with multiplication of crimes. Crimes multiply when the same offender recommits several crimes and he is not prosecuted for any of them. This is the meaning of criminal multiplicity.

Multiplicity of crimes may be both in form and in substance. If an offender does the same act more than once having a number of legal implication and more than one section of the law applies thereto, the commitment of such an act would amount to the formal multiplicity; for instance a servant inflicts a blow while performing his duty, which may possibly constitute confrontation and transgression. But if the offenders' acts are such that each of them may turn into a substantive crime then such commitment of several criminal acts is substantial multiplicity.

Differences between multiplicity of punishments and recommitment of crime.

Multiplicity of punishments must be distinguished from repetition of crime. In the case of multiplicity of crime the offender commits several crimes and no legal proceeding is instituted against him for any of the crimes, whereas in the case of repetition of crime the offender recommits crime after being previously punished.

Logic demands that in the case of multiplicity of crimes the offender involved should not be awarded punishment for all the offences he is guilty of although he exhibits natural tendency for crime; for when he commits the offence, he will not have been previously convicted, nor have learnt from any previous punishment. Hence he is different from the habitual offender who has already been punished and thus warned to lead the right sort of life.

508. Laws in Force and Multiplicity.

In the case of multiplicity of crimes the laws in force provide for three methods:

1. **Combination:**

This is the method adopted under the English law. It requires that the offender should be awarded the punishment prescribed for all the offences he is guilty of.

The demerit of this method is excess of punishment. Combination of all the punishments results in exceeding severity. For instance, if the punishment of imprisonment for several terms is combined, it will amount to lifelong imprisonment. Similarly if several fines are combined it may mean that the entire property of the offender is to be confiscated.

2. **The second method is known as 'supersession'.**

This means that the most severe punishment should revoke other punishments by superseding them and of the punishments prescribed for the crimes committed by the offender, the harshest should be awarded.

This method inheres deficiency and relaxation. For instance a person guilty of ten offences will get only the most severe punishment and will not be subject to punishments for the remaining offences. In other words, a person guilty of heinous crime will get severe punishment and will be free to continue committing other crimes till he is awarded and inflicted the severe punishment.

3. **The third method involves blending.**

It tries to do away with the drawbacks of the preceding two methods by blending them together, stipulating that the punishments may be combined only to a limited degree and that maximum punishment is laid down without involving excess, and the only one punishment to be awarded should not be hard beyond a legitimate limit.

In most of the modern laws the two methods have been combined.

509. The Egyptian Punitive Law

The Egyptian punitive law is based on the principle of the

multiplicity of punishments. Article 33 of the penal code lays down that punishments restricting freedom may be numerous save those exempted under articles 35 and 36. Article 35 provides that rigorous imprisonment sentence with its prescribed term does away with any punishment of confinement which may have been awarded prior to passing such sentence. According to section 36, if a person has committed several crimes before he is convicted the punishment of hard labour for a fixed term awarded to him must not exceed twenty years, although such a punishment is given in the case of multiplicity of punishment. Similarly the punishment to be served in a jail or that of punishment of jail and confinement must not exceed twenty years. Only the term of simple confinement is not to exceed six years.

In other words the Egyptian law has incorporated the concept of multiplicity but qualified it in three ways:

1. The punishment of rigorous imprisonment with its quantum of term renders ineffective any punishment restricting the freedom of the convict decided prior to passing of sentence to rigorous imprisonment. For instance a person is sentenced to ten years' simple imprisonment and subsequently to another five years with hard labour. He is to serve hard labour for five years plus five years of simple imprisonment. This means that the Egyptian law has adopted the second method of super session but does not follow it in totality.

2. In the case of the plurality of punishment the maximum limit of rigorous imprisonment is twenty years, of simple imprisonment and confinement is twenty years and simple confinement is six years. This means that the Egyptian criminal laws adopt the method of combination but not in its totality.

3. As formal multiplicity, only that punishment will be awarded which is more severe in form. In the case of substantial multiplicity also, the most severe punishment will be applied provided that crimes are committed for one and the same purpose and that they are inseparably linked together admitting of no analysis. This is provided in article 32 of Criminal Law and the proviso here is based on the method of combination.

It is remarkable that such reservations on the theory of the

multiplicity of punishments was incorporated in the laws in force in the last century. Before that, multiplication of punishment was absolutely unqualified.

510. The Islamic Shariah and Multiplicity of Punishments

The Islamic *Shariah* was familiar with the doctrine of multiple punishments right from the day of its promulgation. But it has not accepted this doctrine without reservations but rather qualifies it by two concepts, The concept of interpenetration and the concept of super-session.

The concept of Interpenetration,

This implies that in the event of multiplication, the punishments of various crimes would overlap and only a single punishment would apply to all the offences on the whole. The single punishment would be awarded to the offender as if he has committed only one offence.[1] This concept is based on two principles:

First Principle:

If the crimes multiply but their nature remains the same, as for example thefts, several acts of adultery and calumniation, then punishments would interpenetrate and a single penalty would he enough for all of them. However, if the offender commits another offence of the same nature after the sentence is passed he will be subjected to another punishment.

What matters in this context is the enforcement of punishment and the sentence passed. Thus the offence committed would be treated as one whose punishment is not yet enforced.

According to the prevalent view, if the offences relate to the same subject they will be treated as being of the same nature although their ingredients and punishments may be different, for example theft and dacoity both constitute larceny, although their elements and punishment are different. Similarly adultery committed by both married and unmarried persons is identical offence and the punishment in both the cases would be severe.

1. *Sharh Fath-ul-Qadeer*, vol. 4, p. 205; *Al Zurqani* vol. 8, p. 108; *Asna-al-Matalib*, vol. 4, p. 157; *Al Mughni* vol. 10, p. 197.

Raison D'etre of this principle

The basis of this is that the object of punishment is reformation and deterrence and in order to achieve this twofold purpose a single punishment will be sufficient. Confidence in the efficacy of single punishment in the achievement of the object in view and for making the offender abstain from recommitting the offence, multiplication of punishment would be unnecessary although it may be rationally possible that the offender may be guilty of the offence again, but a mere possibility of such an event is insufficient until and unless it is unequivocally established that the single punishment applied to him has failed to produce the desired result. If the offender is found guilty and is awarded punishment and subsequently commits the offence again then he must be punished again for the second offence because the first punishment is not sufficient to prevent the offender from recommitting the offence.

Second Principle

If the offences are numerous and are of different nature, all the punishments would interpenetrate and only a single punishment would be enough provided that the purpose of the punishments prescribed for the offences involved is one and the same, i.e. the safeguard of public interest. For instance, some one insults a government servant, combats and oppresses him, he will be liable to a single punishment for all the three offences, for the purpose of punishments is the same i.e. the protection of the government servant and government services. Or again, if a person eats the flesh of a dead animal, blood and the flesh of swine, he will be awarded the same punishment for all the three offences, for the object of punishments prescribed for these offences is identical and that is the protection of the community and the individual's health.

As regards the principle of interpenetration of punishment, it is the enforcement of punishment that matters and not the sentence passed by the court. Hence the offence committed before the enforcement of punishment will be treated as falling under the punishment of an offence whose punishment has not yet been awarded.

The Malikites hold that the punishment of drinking wine and the punishment of calumniation will interpenetrate and in case of multiplicity the same punishment will be awarded for both the offences. They argue that the purpose of the punishments for the two offences is identical, for whoever drinks wine will rave and in his fit of delirium will make false accusations. The punishment prescribed for drinking wine is also intended to curb slander or qazaf. Other schools of jurisprudence do not subscribe to this view, for according to them the punishment of Qazaf or false accusation is designed to safeguard the people's honour, whereas the punishment of drinking wine aims at the protection of the mind. Hence the aims of the two punishments are different.

Some of the Malikites opine that the interpenetration of the punishments laid down for drinking and *qazaf* relates to the identity of their quantum, since according to them the basis of interpenetration owes itself to the identity of punishment and not to the identity of the purpose of punishment. But other schools do not seem to subscribe to this view.[1]

If numerous offences belong to different categories and their punishments are not harmonized by a single purpose, then their punishments will not interpenetrate but will multiply in keeping with the multiplication of offences.

Theory of Supersession

The meaning of supersession or *'Jaab'* in the *Shariah* is this that being content with a single punishment, enforcement of other punishments is stopped by enforcing that one punishment. In this sense *'Jaab'* is applicable to the punishment of homicide, because away enforcement of this punishment invariably does away with the enforcement of other punishments. This is the only punishment which overrides other punishments.

The jurists differ on the concept of *'Jaab'*. For instance Imam Malik, Imam Abu Hanifa and Imam Ahmed acknowledge it and Imam Shafi'ee does not. Again, the jurists who accept it do not all agree with regard to its application.

Imam Malik, for example, opines that the *had* which

1. *Sharh-Al-Zurqani*, Vol. 8. p 108.

accumulates with homicide on *qisas* will not remain valid and that homicide will put an end to all punishments save the punishments of *qazaf.* For in the case of qazaf, the *had* for it will be enforced first and then capital punishment will be put into effect. Besides, no offender will be awarded any punishment along with death penalty but the *had* of *qazaf,* lest it should be alleged that this *had* has not been applied.[1]

Imam Ahmed holds that some *hudood* related to Allah including death penalty such as in the case of married person who is guilty of theft commits adultery also as well as drinks wine and commits homicide in a brawl, then execution of such an offender will suffice as a punishment of all offences referred to while all the other punishments will stand annulled. But if these *hudood* of Allah include any right of the people (individual) also as well as involve capital punishment will be fulfilled first and then the remaining hudood of Allah will be added to death penalty, whether such penalty is in the nature of retaliation or *had,* for instance, an offender cuts off the finger of a person, levels a false charge against him, drinks wine, commits theft and adultery and also kills someone. First of all his finger will be amputated in retaliation, followed by the infliction of *had* for *qazaf* or *false* charge. Finally he will be executed and all the remaining punishments to which he is liable will stand invalidated.

According to Imam Abu Hanifa, should the *hudood* accumulate, the right of the people will be given precedence (i.e. the right of the individual will be preferred to the right of the community), for the individual stands in greater need of profiting in by his right. If there is no possibility of fulfilling the duties towards Allah after fulfilling the obligations towards the individual, then those duties will cease to be valid. However, if it is possible, then they should be fulfilled as far as possible and what remains will stand annulled as the Prophet (S.A.W.) says:

"Revoke the hudood as much as possible".

For example an unmarried person being guilty of capital crime commits adultery and then drinks wine such an offender

1. *Al Mudawwanah;* Vol. 16, p.12.

will be executed. Remaining punishments he is liable to, will stand invalidated. Should he be married and commits adultery, levels a false charge, commits theft and drinks wine, he will first be subjected to the *had* for *qazaf* because it is the right of individual who is wronged. After that he will be stoned to death. Other punishments to which he is liable will cease to be valid. If the punishment of qisas accumulates with these *hudood,* then the *hudood* will be invalidated except *qisas.* However, in either case mulct for the goods stolen will be payable[1]. Apparently the view of Imam Abu Hanifa is in tune with that of Imam Ahmed.

Imam Shafi'ee rejects the doctrine of supersession *(Jaab).* He opines that in the absence of interpenetration all the punishments will be put into effect one by one. This would be done in such a way that if no capital crime is involved the punishments will begin with what is due to the wronged individual, followed by what is due to the community, provided that this too does not involve any capital crime. The offender will finally be executed. Suppose, for example, many a hudood accumulate against an offender: The *had* of adultery for an unmarried person, that of qazaf, larceny, robbery and retaliation for homicide. All these *hudood* will be put into effect in this manner: First he will be subjected to *had* on account of *qazaf* and then imprisoned. After recuperation he will be flogged as a *had* for adultery and imprisoned till he recovers. After that his right hand and left foot will be amputated as a punishment for theft and robbery. Finally he will be put to death. Should he die during the enforcement of these *hudood,* the rights *(hudood)* of Allah will stand annulled but the individuals will have their dues such as the blood price and the stolen goods. Imam Shafi'ee assigns last place to execution in the order of punishments because he does not accept the punitive doctrine of *'Jaab'*[2]*!*

Some jurists of the Shafi'ee school hold that if an offender is guilty of minor theft and then commits robbery, his hand is not to be amputated for theft but he is to be executed for robbery. Similarly if someone commits adultery before marriage and is

1. *Sharh Fath-ul-Qadeer* Vol. 4, P. 208; *Badae'wal-Sanae',* Vol. 7, P. 62.
2. *Al Muhazzab.* Vol. 2, p. 305.

consequently flogged. He commits adultery again before being banished, only a single punishment of banishment will be enough. If an unmarried person commits adultery and then commits adultery again after being married but before undergoing the punishment of lashes for the first act of adultery the punishment of lashes would be converted to *rajm* (stoning to death). As a matter of fact the doctrine of Jaab is not the reason for inhibition as applied to amputation punishment and flogging. It is rather the application of the doctrine of interpenetration; for an ordinary act of stealing is in itself is a sort of robbery with the only difference that the former may be termed as a minor case and the latter as a major case of larceny. Banishment is the punishment of adultery. If this punishment is not enforced in the case of first act of adultery, it will be enforced in the second act and it would be enough for both the acts. Flogging is the punishment prescribed for an unmarried adulterer. If he commits adultery again before being subjected to the prescribed punishment then the second punishment which is intended for a married adulterer would be enough for both the acts of adultery.[1]

511. The Shariah and the Modern Law Compared

The basis of strings attached to the multiplicity of punishment by the Islamic *Shariah* are the same that constitutes the basis of conditions laid down in the modern law in force. Both regard the offender as helpless in the commitment of second offence inasmuch as he is not subjected to the punishment for the first offence before committing the second. Both of them consider the consequences of unqualified multiplication of punishments inconsistent with reason and logic.

In spite of this point of agreement between the *Shariah* and the operative law, the application of the doctrine of multiplicity by the Islamic *Shariah* is far more logical and subtle than by the law in force. This subtlety is manifest also in the application of the doctrine of interpenetration, which the *Shariah* does not apply without reservations. It rather brings into play this doctrine only in the cases of such single crime which is recommitted again and again and also in the case of various offences committed to achieve

1 *Asna-al-Matalib*, Vol.4. p. 157.

a single object. Apart from these the *Shariah* does not apply it to any other case, because each offence entails one punishment. If the offender commits the same offence time and again before he is punished for the first offence he is guilty of, his plea that multiplication of punishment has no sense in the absence of the application of the punishment for the initial offence must be accepted. But if he commits different kinds of crime and does not get punishment for any one crime, this can be no excuse for exemption from the punishment of another crime, for all crimes are severely prohibited acts and each crime entails a separate punishment. Punishment for any one crime has not been laid down to prevent the offender from committing all the crimes. Each punishment, on the contrary, has rather been prescribed to deter the commitment of a specific offence. Besides, some relative factors have been kept in view in the prescription of each punishment, which are not involved in the determination of any other punishment. For example, in the case of larceny the factors taken into consideration are such as may serve as a deterrent to the incidence of theft. Similarly in the case of flogging and *rajm* the relative factors taken into consideration are such as may prevent adultery. Thus the punishment of *qazaf* cannot serve as the punishment of theft. Likewise the punishment prescribed for theft cannot replace the punishment prescribed for homicide, nor can it serve the purpose of making an offender desist from committing homicide. Hence it is essential there should be different punishments for different offences and the offender should be given specific punishment prescribed for each offence.

However, the laws in force differ from the *Shariah* on this point. They admit of a plea in respect of another crime in the event of non-enforcement of punishment in the case of one crime, regardless of fact whether the two crimes are of the same kind or fall under different categories.

In the *Shariah* the scope of the doctrine of interpenetration is much wider than in the modern law, for the modern laws are acquainted with only one form of interpenetration and that is the case of an offender committing numerous crimes for one and the same purpose and those crimes are inseparably linked together. The legal experts interpret this form as actually the application

of the concept of *'Jaab'* or supersession. But in reality this constitutes interpenetration inasmuch as a single punishment is awarded for all the offences. As a rule *'Jaab* comes into operation after the passing of a sentence whereas interpenetration takes place before as well as after the passing of a sentence. The form of interpenetration which the modern law accepts is similar to the second principle of interpenetration as laid down by the *Shariah.*

From the foregoing statement it may be inferred that although the laws in force acknowledge the principle of interpenetration, but they differ from the *Shariah* in respect of the grounds on which the *Shariah* accepts interpenetration. According to the modern law the basis of interpenetration of punishment is that the offender commits various offences with a view to obtaining one and the same object and such offences are commingled to such a degree that they are not amenable to analysis. In the *Shariah,* on the other hand, the basis of interpenetration is the singularity of purpose for different punishments laid down. This is the basic purpose between the two. The modern law subjects the doctrine of interpenetration to the object in view of the offender for committing an offence whereas the *Shariah* subjects it to the object kept in view by the law giver in making the law. In this respect the law in force is unstable from the logical viewpoint and self-contradictory from theological viewpoint. The *Shariah* on the contrary is logically self-consistent and characterised by singularity of purposes.

There is yet another point of divergence between the two. The modern laws determine an ultimate limit of punishments in the case of their multiplication which they do not overstep. But the *Shariah,* does not lay down any such rule. Necessity is the *raisond'etre* of this limit in the modern laws, for the substantive punishment of these laws is the various kinds of imprisonments. In some cases it is simple imprisonment, in others hard labour for fixed terms and in still others rigorous life imprisonment. Had the ultimate limit of punishment not been laid down in the law in force in the case of multiplication of punishments, many imprisonments for fixed terms would have accumulated to turn into life imprisonment and the punishments would never have come to an end. As opposed to the modern law, the substantive

Shariah punishments are amputation of limb and flogging, and these cannot become indefinite punishments because of multiplicity. Hence there was no reason in the *Shariah* to fix the ultimate limit of punishments on grounds of multiplicity.

Although the *Shariah* has prescribed imprisonment for fixed term for certain *ta'zeer* offences, yet having accepted the doctrine of interpenetration there was no need to fix the ultimate limit of this punishment, for the offenders are generally used to commit only one offence or offences similar to it. Now if an offender recommits the same offence time and again he will be awarded a single punishment under the doctrine of interpenetration. If he commits similar crimes it will not be possible for him to commit three or four crimes. If he is awarded separate punishments for each of these crimes it is not necessary that all punishments should be imprisonment. Even if it is presumed that all of them are punishments of imprisonment their aggregate quantum would exceed a reasonable limit, particularly when we keep in view the fact that some jurists of Islam fix one year as the maximum limit of imprisonment or that the competent authority is empowered to fix three years as the maximum limit. Along with all these factors the second principle of the doctrine of interpenetration will operate leading to mitigation in punishment. The reason is that the punishment for similar offences are generally designed to achieve one and the same object and therefore punishments for accumulated offences will interpenetrate.

The *Shariah* and the law in force both acknowledge the doctrine of *'Jaab'* but they differ on the application of this doctrine. The *Shariah* resorts to its application when other punishments accumulate with capital punishment (as has already been seen) whereas the law in force also applies it in the event of rigorous imprisonment accumulating with a curb to be imposed on the individuals freedom i.e. confinement. In such a case rigorous imprisonment will invalidate the individual's detention. But the *Shariah* does not need to take the second course of action, since imprisonment is not provided it as the substantive punishment. Besides, the term of imprisonment provided in it is very short. Again, as has already been mentioned, there is no possibility under the *Shariah* to convert various punishments into a life long

punishment. Over and above all these considerations, the *Shariah* does not divide the punishment of imprisonment into various kinds. Rather it consists of a single kind and single quantum as long as its term remains limited.

In cases where the Shariah adopts the concept of unlimited imprisonment in does not qualify this punishment by any condition except that the prisoner repents in all sincerity and is reformed in the real sense of the word. It so being the case there is no reason for the *Shariah* to limit the term to imprisonment at all. If the offender repent and is reformed, he will be automatically released. He will not be required to complete any term of imprisonment. In both the cases when the offender repents or remains in the jail till he dies, the point is to protect the society against his wrong doing. If he repenents and thus ensures the safety of the society from his evil acts he will secure his release. If he does not, he will remain in jail till his death and the society will thus he immune from his criminal activities.

CHAPTER X

EXECUTION OF PUNISHMENTS

512. Right of the Execution of Punishment

In respect of the execution of punishments the *Shariah* classifies the crime into three kinds: crimes involving *hudood* crimes involving *qisas* and crimes involving penal punishments *(ta'zeers).* If *any* of these crimes is imputed to a person lie will be prosecuted against in a court of law. If the charge against him is established, sentence will accordingly be passed keeping in view the prescribed punishment. If the charge cannot be established the accused will be acquitted. If the sentence is passed, the ruler or the competent authority will be responsible for its execution in respect of offences involving *hudood* and penal punishments. In the case of a crime relating to *qisas,* the victim or his lawful heir will be within his rights to execute the punishment under specified conditions. Details about the execution of these punishment are as under:

513. Execution of Punishment in the Case of Hudood Crimes:

The jurists are agreed that the punishment prescribed for offences involving *hudood* can only to be executed by the ruler or his deputy for *had* is Allah's right which has been made obligatory in the interest of the community. Hence the responsibility for its execution will be vested in the Imam or the ruler of the community. Besides, awarding of *had* of punishment requires exertion of the mind (ijtihad) and it is likely to exceed the limit or be less than it. Hence it is to be established by the ruler himself or depute his representative to do it on his behalf.

The presence of the *Imam* is not essential for the execution of a *had* for the Prophet (S. A.W.) did not consider it necessary present on the occasion. He ordered it in the case of an adulteress in the following words:

"Ø Anees, go to that woman and if she confesses stone her to death".

Similarly the Prophet (S.A.W.) ordered *rajm of Ma'iz,* but was not himself present on the scene of stoning.

When a thief was brought he said:

'Take him away and amputate his *hand."*[1]

Permission of the Imam is essential for the execution of a *Had.*

During the Prophet's lifetime no *had* was executed without his permission. In this connection the following tradition is also Quoted:

"Four matters are assigned to the rulers: Hudood, Alms, Friday (prayer) and Revenue".

Although as a general rule, the execution of a *had* is the responsibility of the *Imam* or his deputy, yet if some one else executes it, he will not be accountable for doing so provided that the *had* amounts to killing the offender or cutting off his limb[2] However, the person who executes the *had* on his own will be accountable for encroachment on the power of the competent authority. But if the *had* consists of an act other than taking the offender's life or destruction of his limb, such as flogging in the case of adultery and calumniation, the person doing so will be accountable for flogging and for the injury caused to the offender by it and other results thereof. The difference between the two cases is that the *had* involving death and destruction of limb invalidates the protection of life and limbs and thus the nullification of the protection of life and limb legitimizes killing the offender and cutting off his limb, and such acts do not constitute any offence whereas in the case of a *had* that does not involve taking life and amputation of limb, the safeguard of life and limb is not invalidated but remains valid. Hence such a *had* put into effect by any one other than the person authorised to execute it, will be treated as an offence.

514. Execution of Ta'zeers

Execution of *ta'zeers* is the responsibility of the competent authority or his deputy inasmuch as these punishments are meant for the safeguard of the community. Hence *ta'zeer* is the right of the community and thus it will be executed by the competent

1. *Al Sharh-al-Kabeer*, Vol. 10, p. 121.
2. *Al Iqna'a*, Vol. 4, p. 245.

authority or a person deputed by him. Besides, like *hudood, ta'zeers* may also call for careful thought as they involve possibility of overstepping the limit..

With the exception of the *Imam* or his deputy, nobody has the right to put a *ta'zeer* punishment into effect, even if such punishment involves killing of the offender. If any one kills an offender who is already sentenced to capital punishment as a *ta'zeer*, he will be treated as killer, in spite of the fact that capital punishment constitutes destruction of life. The difference between a *had* destructive of life and a *ta'zeer* destructive of life is that the *had* can neither be forgiven nor annulled nor delayed. It is a final punishment and its enforcement is imperative; whereas *ta'zeer* may be condoned by the *Imam* and as such its execution is not absolutely essential. It does not do away with the safeguard of the accused, for may be that the *Imam* finally decides to pardon him.

515. Execution of the Qisas Punishment

The punishments of offences involving *qisas* as a rule, are also the responsibility of the *Imam* like other punishments. But in the case of *qisas,* exemption is allowed from the rule, for *qisas* is to be put into effect through the victim and his lawful heir. Such an exemption rests on the following divine decree:

> "And slay not the life which Allah hath forbidden save with right. Whoso is slain wrongfully, we have given power unto his heir but let him not commit excess in slaying" (17:33)

There is general consensus on this that in the case of homicide, the victim's party has the right to put into effect the punishment of *qisas* provided that it is executed in the presence of the competent authority, for *qisas* involves *ijtihad* and is likely to result in excess. However, if the aggrieved party puts qisas into effect in the absence of the competent authority it will be retaliation alright, but the party will be liable to *ta'zeer* punishment for encroaching on the powers of the latter as it does an act which it is not allowed on its own. The judge or the competent authority will decide whether or not the victim's lawful heir is capable of performing *qisas* in a better manner taking into account

his capacity and the knowledge essentially required in such a case. If he is of the opinion that the heir is not capable of doing so then he will appoint some suitable person to perform the act on the heir's behalf.

There is nothing in the *Shariah* barring the appointment of a permanent paid functionary for the enforcement of *hudood* and *qisas*. In fact the appointment of such a functionary would be in the public interest.

In case if *qisas* does not involve a capital crime, the victim according to Imam Abu Hanifa will perform *qisas* provided that he knows how to do it and can do it in a better manner. Otherwise he will nominate some one else to perform it for him. The *Hanbalites* quote this opinion of Imam Abu Hanifa as reference.[1]

Imam Malik and Imam Shafi'ee (as also some jurists of the Hanbalite School) hold that in the case of an offence other than capital crime the victim can on no account perform the act of *qisas* even if he is capable of doing in an efficient manner, for it is feared that he will commit an excess which could not be atoned for. It is therefore, in the fitness of thing that in the cases of qisas for non-capital offences the act of retaliation should be performed by one who knows the technique and that such person should be specially appointed for the purpose[2].

516. The Mode of Qisas for Capital Crime

According to Imam Abu Hanifa the act of retaliation for murder may be performed with a sword. Similar remark is also attributed to Imam Ahmed sword is to be used whether the killer slays his victim with a sword or some other weapon. Again sword should be used whether the victim is beheaded or dies of a wound inflicted upon him or is stifled to death or killed by drowning or burnt alive or murdered in any other way. This verdict is supported by a saying of the Holy Prophet (S.A.W.) which is as follows:

"Qisas cannot be executed with anything other than sword". In this saying the word used is "qood" which is synonymous with qisas and the edict of the Prophet (S.A.W.) means that only sword is to be used for retaliation and nothing else.

1. *Badae'wal-Sanae'*, vol. 7. p. 246; *Al Sharh-al-Kabeer.* vol. 9, pp. 389-99.
2. *Mawahib-ul-Jaleel*, vol. 6. Pp. 256-4; *Al Mohazzab*, vol. 2, p. 197; *Al Sharh al-Kabeer*, vol. 9, p. 399.

Even if the victim's death occurs in consequence of the fatal effect of cutting his limb, retaliation is to be done with a sword for when the criminal act occurs it is actually homicide. For this reason such a homicide is to be retaliated. But if the offender's limb is amputated first and then he is beheaded in an attempt at the exact requital for the offence two punishments of amputation and decapitation will accumulate and thus the retaliation will not bear resemblance to the original offence. In a case like this, decapitation will not be treated as the complement of amputation, for complement of a thing is ancillary to that thing. Now decapitation is homicide which is stronger than amputation and as such cannot be ancillary to the latter. Besides, if qisas is designed to execute the offender and the purpose of execution can be served by decapitation, how can amputation be justified? Amputation in this case is actually torture and not *qisas*.

If the lawful heir of the victim wants to kill the offender with something other than a sword he cannot legitimately do so. However, should he kill him in this manner, he will be liable to a *ta'zeer* punishment for resorting to such a wrong method. Nevertheless, the purpose of retaliation will be served alright if he kills the offender by hitting him with a duo or stone, hurling him down from a height or pushing him down into a well. The lawful heir of the victim has the right to retaliate, whatever the means by which he does so; but using means other than a sword is wrong and for this he will be awarded penal punishment[1].

According to Imam Malik and Imam Shafi'ee (and a tradition attributed to Imam Ahmed also)[2] a killer should be treated in the same way as he treats his victim. If he kills the victim with a sword, he too, will be killed with a sword for, says Allah:

> "One who attacketh, attack him in like 'manner as he attacked you". (2:194)

Hence if the offender burns his victim alive, kills him by drowning, hitting with a stone, hurling down from a hill, beats him to death with a stick or starve him to death, the lawful heir

1. *Badae'wal-Sanae'*, vol.7 p.246; *Al Sharh-al-Kabeer*, vol. 9, P. 400; and the sequel.
2. *Mawahib-ul-Jaleel*, vol. 6, p. 256; *Al Muhazzab*, vol. 2, p. 196, *Al Sharh-al Kabeer*. vol. 9, p. 400.

of the victim may retaliate in the same manner. The divine decree to this effect is as under:

"If ye punish then punish with the like of that where with ye were afflicted" (16:126)

Moreover, *qisas* is based on resemblance and resemblance in action is possible. Therefore, retaliation in the above manner is also right.

In all the cases referred to, the victim's heir may choose to use a sword for retaliation, for he is allowed to kill as well as torture the offender. Hence if he retaliates by using a sword and renounces some of his right, he may legitimately do so.

But if the mode of killing in itself is forbidden by the *Shariah* such as killing any a homosexual act or making the offender drink wine, then according to the most preferred view, the act of *qisas* will be performed with a sword.

517. Weapon to be used for Qisas

Should the lawful heir of the victim perform the act of qisas. It is not enough that he knows the method of doing it but is also under obligation to see that the weapon he uses for the purpose is not blunt or poisoned or one which is likely to torment the offender. If any of these conditions is not fulfilled the victim will be liable to penal punishment because one of the conditions laid down for qisas is that the offender is not tortured and dies an easy death[1]. Says the Holy Prophet (S.A.W.):

"Allah presupposes decency in everything. Even if you kill then kill in a fine manner, slaughter then slaughter in a fine manner: the blade of the knife used should be sharp so that the animal to be sacrificed may feel relieved".

518. Is the Use of a Sharper Weapon than Sword Is Allowed?

Use of sword for *qisas* has been prescribed keeping in view the fact that life can quickly be taken with it, and easily as far as far as possible and the offender, is relieved of torture. If a sharper weapon than sword is available, there is nothing in *Shariah* disallowing its use. Nor is there anything in the *Shariah*

1. *Al Muhazzab,* vol. 2, 198; *Al Sharh-al-Kabeer,* vol. 9, p. 397.

inhibiting the use of guillotine or electric chair for *qisas* which may cause easy and quick death. The use of such instruments neither disfigures the condemned man nor tortures him. Guillotine is itself a sharp instrument and electric chair causes instantaneous death without disfiguring or torturing the person to be executed.[1]

519. Can Government in Power Today Reserve for Itself the Function of Performing Qisas?

Most of the jurists hold that in the case of an injury which is not fatal, the responsibility of retaliation cannot be left to the victim or his lawful heir, for this kind of qisas requires experience and knowledge of technique. If it is left to the aggrieved party there is every likelihood of torture and transgression.[2] *Qisas* for capital crime, of course, may be performed by the victimor his lawful heir provided that he used the right instrument in the right manner. If he is unable to perform the act of *qisas* in the right way, he will nominal a representative who knows the job. This means that the guardian's right is subject to the condition of execution and the use of the right instrument.

In ancient times the people used to keep weapons and knew how to use them. But today the people do not know use of the sword in particular and one who keeps a serviceable sword is hardly to be found.

Besides, death is instantly caused by hanging, guillotine or electric chair as has been practically proved. These instruments are in the custody of the state and no individual has access to them.

In view of the above considerations, the circumstances of modern age require that the victim should not exercise his right of qisas in person as was done in the past, but the state should rather appoint functionaries for the purpose. If the lawful guardians want to have *qisas* they should permit those functionaries to do the job for them. However, if they want to forgive the offender, then they should not permit them to do it.

1. *Fatawa Majilis-e-Al Azhar* relating to *qisas.*
2. *Al Mughni,* Vol. 9, P. 412: *Al Muhazzab* Vol. 2, P. 197; *Mawahib-al-'aieel,* Vol. 6, p. 253.

520. Execution of Punishment in Case of Multiplicity

The *Shariah* differs from the laws in force on the question of accumulated punishments. This difference owes its origin to the punitive temper of the two laws.

If we take the Egyptian penal code as an example of the laws in operation, it provides that in the case of accumulation all the punishments will come into effect in accordance with their magnitude: First of all rigorous imprisonment will be enforced followed by detention in a jail, confinement with hard labour and simple confinement respectively. (Article 34 of Penal Code).

At the time of enforcement, the order of punishments will not be taken into account. For instance, if an offender is sentenced to rigorous imprisonment when serving a jail term or simple imprisonment, the latter punishment will cease to operate and rigorous imprisonment will come into effect.

According to the Egyptian law, punishments will be enforced successively in such a way that the expiry of one term will be immediately followed by the term of another punishment. On no account will punishment be suspended or put off. Punishment will continue to be in operation even the offender is sick or handicapped.

This procedure has emerged Out of the temper of punitive law. Since the enforcement of the foregoing sentences takes a long time, the order of their execution referred to is invalidated. It is invalidated as long as sentences of rigorous imprisonment with the length of their terms invalidate every punishment which enforces restraints on a individual's freedom and which is awarded before such sentences and as long as there is likelihood of a sentence of hard labour being passed during the term of a punishment being served by the offender.

In the case of accumulated punishments the procedure laid down by the *Shariah* is different from that for the law in operation and every school of Islamic jurisprudence holds a different view about it.

According to Imam Malik, in the case of accumulated punishments, beginning will be made with the punishment which is subject to the right of Allah, i.e. relating to the community. It

will be followed by the subject to the right of the individual. Imam Malik argues that the right of Allah cannot be waived while the right of the individual can be relinquished. Hence it is in the interest of the offender to defer the right of the individual. It is however, of little consequence with Imam Malik whether the enforcement of punishment begins with a severe sentence or a lighter one. He leaves it to the lawful guardian to decide as he likes.

Imam Abu Hanifa and Imam Ahmed hold that the punishments subject to the individual's rights are to be preferred to those involving the right of Allah. In the case of the former, punishments will precede the harsher ones followed by such punishment bearing on the rights of the community as would do away with the remaining punishment.

Imam Shafi'ee opines that all punishments will be enforced in order of lightness - lighter ones taking precedence. All punishments will be put into effect giving precedence to the right of the individuals, for Imam Shafi'ee does not acknowledge the doctrine of *'jabb'*.

In giving lighter punishment precedence over the harsher ones, the *Shariah* is in disagreement with the Egyptian law. But the Egyptian penal law is in tune with the spirit of the *Shariah* punishments; for the substantive *Shariah* punishments are amputation of limb, flogging and qisas, and these are corporal punishments. The enforcement of these punishments must begin with the lighter ones so that the offender remains safe without losing his stamina. Severe punishment will take precedence over the lighter one only when it is such a one as puts an end to the remaining punishments. In this respect the *Shariah* is in harmony with the Egyptian law.

521. Application of Punishment to Ailing, Aging and Insane Persons

The jurists of the *Shariah* unanimously hold that if the offender is ill or unfit at the time fixed for the enforcement of punishment, as for example, it is too hot or too cold, then infliction of *qisas*, *hudood* and equivalent *ta'zeers* are to be necessarily put off. They exempt only capital punishment from this rule inasmuch

as such punishment aims at killing the offender unlike other punishments. Hence punishments other than death penalty should not be put into effect in deadly conditions.

Some jurists are of the view that punishment should be deferred till the offender regains strength. But other jurists do not subscribe to this view. They would rather prefer to enforce it taking care that it does not cause any harm to him because of his weakness. For instance, in the case of a sentence of flogging, a stick with several branches or a switch with many shoots should be used and the offender should be struck with it once, twice. As for an unconscious person, punishment should not be put into effect till he regains consciousness.[1]

522. Application of Punishment to Pregnant Woman

The *Shariah* has right from the very beginning acted on-the principle that no pregnant woman will be subjected to the enforcement of punishment. The tradition relating to the woman named Ghamidya is unequivocal. When she confessed her guilt of adultery in the presence of the Holy Prophet (S.A.W.) and told him at the same time that she was pregnant, the Prophet (S.A.W.) said, "Go now and come again after giving birth to your child." He also said to Hazrat Mu'az "You can have control over her but you cannot have control over what is in her womb."

The punishment prohibited in the case of a pregnant woman is one which is likely to damage her pregnancy, e.g. qisas, *rajm* and flogging.

The jurists are unanimous so far as the principle is concerned but they differ on its application.

Thus, according to Imam Shafi'ee if a woman says that she is pregnant or suspects of being pregnant, she will not be subjected to the above punishment until the child is born or unless it is confirmed that she is not pregnant. If a wet-nurse is not available for the child she will be allowed to arrange for one before she is executed.

To this, Imam Abu Hanifa adds that no punishment will be applied to a pregnant woman till the end of her confinement even if the punishment to be inflicted on her is flogging.

According to the Egyptian law, punishments will be enforced

1. *Sharh Fathal-Qadeer,* Vol.3, P.185.

successively in such a way that the expiry of one term will be immediately followed by the term of another punishment. On no account will punishment be suspended or put off. Punishment will continue to be in operation even if the offender is sick or handicapped.

This procedure has emerged out of the temper of punitive law. Since the enforcement of the foregoing sentences taken a long time., the order of their execution referred to is invalidated. It is invalidated as long as sentences of rigorous imprisonment with the length of their terms invalidate every punishment which enforces retraint on a individual's freedom and which is awarded before such sentences and as long as there is likelihood of a sentence of hard labour being passed during the term of a punishment being served by the offender.

In the case of accumulated punishments the procedure laid down by the *Shariah* is different from that for the law in operation and every school of Islamic jurisprudence holds a different view about it.

According to Imam Malik, in the case of accumulated punishments, beginning will be made with the punishment which is subject to the right of Allah, i.e. relating to the community. It will be followed by the subject to the right of the individual. Imam Malik argues that the right of Allah cannot be waived while the right of the individual can be relinquished. Hence it is in the interest of the offender to defer the right of the individual. It is however, of little consequence with Imam Malik whether the enforcement of punishment begins with a severe sentence or a lighter one. He leaves it to the lawful guardian to decide as he likes.

Imam Abu Hanifa and Imam Ahmed hold that the punishments subject to the individual's rights are to be preferred to those involving the right of Allah. In the case of the former, punishments will precede the harsher ones followed by such punishment bearing on the rights of the community as would do away with the remaining punishment.

According to Imam Malik, no pregnant woman is to be subjected to punishment until delivery, and flogging of her will be put off till the end of confinement. If a wet-nurse is available

for the child the sentence of death will be carried out, otherwise her execution will be delayed.

Imam Ahmed holds that if capital punishment or stoning to death is obligatory in the case of a pregnant woman or if she conceives after such punishments become obligatory, she will not be executed until delivery and until she needs to suckle it. But if a wet-nurse is available for the child, she will be executed. It is desirable that the lawful guardian of the victim defers her execution till the child is weaned from her. In case if no wet-nurse could be arranged for, the convicted woman will suckle the baby for two years and the punishment she is awarded will be executed after the child is weaned. The position of Imam Ahmed is with that of Imam Malik who defers the punishment of flogging until the delivery of the pregnant convict.

523. Punishment of an Insane Person

This subject has already been discussed in the context of the accountability of an insane person and the reader is referred back to article 428 of this book.

524. Carrying Out of Punishment in Public

The principle of the *Shariah* is that punishment is to be enforced in public. Says Allah:

"And let a party of believers witness their punishment." (24:2)

Moreover, this has also been the practice. This rule applies to capital punishment and other punishments alike. Punishment in public has also been the practice under the law in force. Formerly, the Egyptian law followed the Western laws in the enforcement of punishment in public, but later on the condition of public execution has been ignored. In the French law this proviso still exists.

According to the *Shariah,* if capital punishment relates to a married adulterer, he or she will be stoned to death.

If it is not a punishment for adultery, then the offender will be beheaded. This is the dominant opinion of the jurists.

The consensus of the jurists is that the offender should be punished without tormentation and disfiguration; that the instrument

used for execution should be sharp; that the executioner should be highly experienced and that the method of execution should be the same for all the people regardless of their ranks and differences between their offences.

The *Shariah* has observed these rights right from its inception. It is only now that the modern laws have incorporated them. Till recently there were gradations of capital punishments like the punishment of imprisonment and also the kinds of torments varied with the kinds of offences. For instance, the hand of father's killer was amputated before putting him to death and the methods of punishment varied with ranks of the offenders: respectable person was punished by decapitation with the sword while a commoner was punished by throttling. But after the French Revolution this procedure was abandoned. A law was promulgated to the effect that in the enforcement of punishment all men are equal and capital punishment will be effected only by taking the offender's life. Other countries got this principle from the French. Consequently various states tried to find out how best to take life without tormentation. Thus France adopted the method of beheading, Egypt and England preferred throttling, Italy shooting and USA adopted the method of electrocution.

The *Shariah* has laid it down that after execution the corpse is to be handed over to the heirs of the deceased, so that they may bury it according to their own custom. Says the Holy Prophet (S.A.W.):

"Bury that body also in the same way as you bury your dead."

It is, therefore, obligatory that the body of an executed person is to be buried like the dead bodies. But if the competent authority fears breach of peace, he may prohibit assembly of people at the burial.

The Egyptian law, however, provides that the body of executed offender shall be handed over to his lawful heirs on condition that no assembly of people would be allowed at the burial (Criminal Investigation Act, Article 262). Similarly, under the Egyptian law, punishment of a pregnant female offender is to be put off till her delivery. (Egyptian Criminal Investigation Act, Article 363).

CHAPTER XI

RECOMMISSION OF CRIME

525. Nature of Recommission of Crime

In modern legal terminology the term recommission of crime applies to the person who commits another crime after the one in the case whereof judgment is already passed. In other words, recommission of an offence is repetition of offences by the same person, in the case of one or more of them verdict has already been given by the court.

Recommission of crime is different from the multiplication of crime, for in the latter case an offender commits the last offence committed by him is not decided, whereas in the case of recommission of crime, when an offender commits the last offence, the cases of one or more offences committed by him are already decided.

Recommission of a crime after decision of the case of previous crime bears testimony to the fact that the offender persists in the commitment of offence and punishment for previous offence has been fruitless. It is, therefore, necessary that harsher punishment should be awarded to a habitual offender. Some criminologists were formerly opposed to giving more severe punishment, but now there are no two opinions about the punishment for recommission of crime.

The experts of punitive legislation do acknowledge punishment necessitated by recommission of crime, but they differ on the principles by which such recommission is established. Some of them maintain that recommission of crime implies that the offender will be treated as habitual when the offence he recommits is akin to or similar to the previous one committed by him. If the subsequent offence does not bear affinity to the previous one, then the commitment thereof is no repetition of crime.

Others contend that recommission is general. When the offender commits a crime again, he is a habitual offender, whether or not the crime is akin or similar to the previous crime committed by him.

Similarly the experts differ on the question of the period intervening between offences. Some of them maintain that the period of recommitment is indefinite so much so that when an offender commits an offence a second time he is a habitual offender regardless of the length of time intervening between the two offences. Others hold that recommission depends on a definite period intervening between the two offences. If a certain period elapses after the commitment of an offence and the offender recommits an offence thereafter, this would not be treated as recommission of crime.

In the Egyptian penal law all the above principles have been commingled. The principle of general recommission of crime is mentioned in clauses No. one and two of Article 39, specific recommission in clause No.3, recommission after indefinite period in clause No.1 and recommission after the lapse of a definite period in clauses No. 2 and 3. In all these clauses the nature, and period of punishment as well as the nature of offence has also been stated.

If an offender is repeatedly guilty of offences, the experts of punitive legislation do not regard his action as recommission of crime. They rather treat the man as a habitual offender and a menace to the society. As such, he must be eliminated. The Egyptian law applies this theory to a limited extent and provides for the removal of a habitual to a place earmarked for the purpose such as a reformatory. He will remain there for a period not exceeding six or ten years and released under the orders of minister for justice. (Article 52-53)

The Italian law promulgated in 1930 provides for the transportation of habitual and professional offenders to an agricultural or industrial area where they are to be confined for two and three years respectively.

In France a law was promulgated on the 27th of May 1985 which provided for the expulsion of habituals to colonies.

In short the laws in force apply the above theory in a limited ambit.

In short, the foregoing principles are the basis on which the concept of recommission of crime rests. What is note worthy in this context is that the principles of the recommission of crime have been introduced into the modern laws in force at a very late stage and the principles devised as to repetition and habit of offences have been treated in them laws as modern principles.

526. The Shariah's Position as to the Recommission of Offences.

Perhaps the reader will be surprised to learn that the so-called new principles of the modern laws are no other than those laid down by the *Shariah* thirteen hundred years ago. In fact the laws in operation have yet to enforce these principles comprehensively, which the *Shariah* had already long ago put into effect.

According to the *Shariah* an offender ought to be awarded punishment for the crime committed by him. If he commits it again he can be given harsher punishments. If he develops the habit of committing crimes, he will either be killed or imprisoned indefinitely. Thus the community will be immune from the evil caused by him. The competent authority will choose either of the two punishments in view of the particulars of the offence and its potential impact on the society. If the offender makes it a habit to commit crimes and does not desist from committing them despite infliction of punishment, he will be put to death in consideration of the viciousness of the offence and of the fact that repetition of the offence would cause moral deterioration and corruption in the community. If a thief is accustomed to committing theft, he will be sentenced to imprisonment for life or till such time that he repents.

The *Shariah* conceives of repetition of crime in absolute terms. The jurists draw no line of distinction between general and special recommission of crime just as they do not distinguish between offences repeated indefinitely and those repeated after the lapse of definite lengths of time. Thus according to the *Shariah* all sorts of recommission of offences, that is general, special indefinite and provisional may occur in any case and it has been

left to the discretion of the competent authority to frame rules in this regard as it deems fit in the public interest.

We have discussed the problem of recommission of offences and the rule' laid down about it by the *Shariah* and the modern laws in operation. The only difference is that the *Shariah* has ceased to be in operation since long and, therefore, the people have thrown it into oblivion, whereas the modern laws are continuously in force and the people are familiar with them.

At any rate, it is the singular distinction of the *Shariah* that the rules it formulated thirteen hundred years ago have now come to be the latest principles of modern laws. Another distinguishing characteristic of the *Shariah* as compared to the modern laws is that it prescribes capital punishment and life-imprisonment for habitual and professional criminals. The experts of modern laws also seem inclined to favour the two punishments, particularly those who believe in measures to safeguard peace and the concept of elimination. These experts hold that the habitual offender should be eliminated from the community or imprisoned for indefinite period so that the society may remain immune from his baneful influence. But the laws in force do not accept these views without reservations. They rather subscribe to the concept of indefinite confinement with qualifications which render it imprisonment for fixed terms, as has been illustrated in foregoing pages with examples from Egyptian Italian and French laws.

In short, the *Shariah* enjoys precedence in laying down rules with regard to the question of recommission of crimes. It has also given the lead in prescribing principles regarding the measures of maintenance of peace and the mode of elimination as well as the pattern of their application which the modern experts desire.

CHAPTER XII

INVALIDATION OF PUNISHMENT

527. Causes of Invalidation of Punishment

There are various causes of the invalidation of punishment but there is no general cause applicable to every punishment. Different reasons affect punishments differently. Some causes invalidate most of the punishments, while others invalidate fewer. Some causes are exclusively linked with certain punishments.

Causes of invalidation of punishments are as follows:

(1) Death of Offender
(2) Loss of the Limb Subject to Retaliation
(3) Repentance of the Offender
(4) Compromise
(5) Remission
(6) Inheritance of *Qisas*
(7) Lapse of Time (time-barred case).

528. Death of Offender

Corporal punishments and punishments linked with the person of the offender stand invalidated with the death of the offender, for the object of punishment is the offender himself. When he is no more, his punishment is inconceivable.

But if punishments involve money or assets such as *diyat,* mulct and confiscation, then they will not be annulled as the result of the offender's death, for in such a case the object of punishment is the property of the offender and not his person. Punishment bearing on the offender's property can be applied posthumously.

The jurists differ on the question that if the punishment of *qisas* is invalidated on the death of the offender, whether or not payment of blood-money from his assets is obligatory. Imam Malik and Imam Abu Hanifa hold that when the object of punishment ceases to exist, *qisas* does stand invalidated but *diyat*

is not payable out of the killer's assets; for *qisas* is imperatively obligatory, whereas blood-money in lieu of *qisas* is obligatory only when the offender so desires. Hence if the offender dies, *qisas* will be annulled but *diyat* will not be obligatory because the offender does not undertake to pay it. It makes no difference whatsoever whether the offender dies as a result of natural calamity or someone kills him in a legitimate manner. If the offender dies of illness, or is killed in consequence of *qisas* for someone's life or put to death as a punishment for adultery or apostasy, the punishment of *qisas* will stand annulled and payment of *diyat* will not be obligatory.

According to Imam Malik, if the offender is murdered wrongfully, the right of *qisas* will devolve upon the lawful heirs of the person killed *ab initio.* For instance, somebody murders a man and the murderer is wrongfully killed by a third person, the right to his blood will vest in the heirs of the person first murdered and the heirs of the second person wrongfully killed will be asked to bring the heirs of the initial victim round to agree with them to strike a transaction with the initial killer's party in respect of retaliation or remission as they may choose or take larger amount as blood-money than they may have paid. If the person guilty of homicide intentionally is murdered, his blood-money will be due to the lawful heirs of the initial victim.[1]

Imam Abu Hanifa treats legitimate and illegitimate death as identical and believes in unqualified invalidation of *qisas* in both the cases. He does not believe in the payment of *diyat* out of his assets as being obligatory. If another offender may have committed excess on him, blood-money is not obligatory out of his assets either.[2]

Imam Shafi'ee and Imam Ahmed are of the view that when the object of qisas ceases to exist the punishment of *qisas* stands invalidated in all cases, whether the offender's death takes place in a rightful manner or wrongful manner. But blood-money is payable out of the offender's assets, for according to them there are either of two factors at work behind homicide: non-retaliatory factor or that which involves *diyat*. If punishment becomes

1. *Mawahib-al-Jaleel,* Vol. 7, P. 231.
2. *Badae-wal-Sanae'*, Vol. 7, P. 246.

ineffective because of the non-existence of any one of the two, the other will become obligatory. The reason is that the mulct which is exchangeable with two causes and the existence of one cause is hampered, the other cause will be established.[1]

The scope of difference between the jurists will be clear in the light of the following example:

When Zaid kills Ali, the lawful heirs of the latter will claim retaliation from Zaid. But if Zaid falls ill and dies, then according to Imam Malik and Imam Abu Hanifa, the right of retaliation will stand annulled and the heirs of the victim will get nothing. On the contrary Imam Shafi'ee and Imam Ahmed maintain that the heirs of Ali are entitled to *diyat* from the assets of Zaid. But if the death of Zaid occurs in such a way that Khalid murders: him intentionally or is crushed by Khalid's vehicle by chance, then in the opinion of Imam Abu Hanifa, right of *qisas* is annulled and the heirs of Ali will get nothing. But Imam Malik is of the view that *qisas* would become due from Khalid and the heirs of Ali may have their retaliation if the murder is intentionally committed and the heirs of Zaid cannot have their retaliation against Khalid, without the consent of the heirs of Ali. But if Khalid kills Zaid unintentionally, he will pay blood-money for Zaid to the heirs of Ali. But in the opinion of Imam Shafi'ee and Imam Ahmed, *qisas* will stand invalidated as the result of Zaid's death, the heirs of Ali will be entitled to payment of blood-money out of Zaid's assets.

529. Extinction of the Object of Qisas

Qisas in this context means retaliatory punishment for an offence other than homicide. By the extinction of the object of *qisas* is meant the loss of limb liable to *qisas* although the offender may be alive. In short, because of the loss of the object or the place subject to *qisas* the punishment of *qisas* for an offence other than homicide stands invalidated.

The rule is that the object of *qisas* for a bloody offence other than murder is the limb identical with the object that is subjected to the commitment of an offence. If the object or place of *qisas* is annihilated, *qisas* will stand annulled. The reason is

1. *Al Muhazzab.* Vol. 2, P. 201; *Al Sharh-al-Kabeer.* Vol. 9. P. 714.

that the object of retaliation does not exist and, therefore, the question of qisas does not arise at all.

According to Imam Malik, if the right of qisas becomes invalid, the aggrieved party has nothing to get inasmuch as in the case of qisas the right of the victim is evident; so if *qisas* stands invalidated, the right of the victim is also nullified. If the object of *qisas* is intentionally destroyed, then the transgressors will be subject to *qisas.* The details of this have already been stated in the context of the death of killer.[1]

But Imam Abu Hanifa believes that the intentional cause of *qisas* is evident. He draws a line of distinction between the loss of the place of *qisas* as the result of a disaster or ailment and the loss thereof in consequence of the exercise of a right such as enforcement of punishment or *qisas.* According to Imam Abu Hanifa in the former case nothing is due to the aggrieved party because of the loss of the object of *qisas;* whereas in the latter case *diyat* is due to him instead of *qisas,* since the offender annihilates the limb subject to *qisas* putting an end to the victim's right to retaliation.[2]

According to Imam Shafi'ee and Imam Ahmed, if the object of *qisas* no longer exists, the victim will be entitled to *diyat,* whatever be the cause of the loss of such object.

The reason is that the cause or intention are either of two things and not *qisas* and *diyat* in particular. Thus if the object of *qisas* ceases to exist, blood-price will become due.

530. Offender's Repentance

The leading jurists of Islam are unanimous that the repentance of an offender guilty of a sanguinary crime invalidates the punishment for acts having impact on the society Says Allah:

> "Save those who repent before ye overpower them. For know that Allah is Forgiving, Merciful." (5:34)

In short, if the injurer or fighter repents before being apprehended, the prescribed punishments for offence affecting the community will stand invalidated. But the punishments for offences affecting individuals will remain unchanged.

1. *Mawahib-al-Jaleel.* Vol. 6. P. 213; *Sharh-al-Durdeer.* Vol. 2, P. 213.
2. *Badae wal-al-Sanae'* Vol.7, PP. 246 and 298.

Although the jurists agree that the punishment for a bloody crime stands invalidated in consequence of repentance on the part of the offender provided that his repentance precedes his arrest but they differ as to the extent to which repentance affects offences other than a bloody one. In this connection they have expounded three theories which have been dwelt upon in context of abstinence from offence and, therefore, we need not deal with them here again.[1]

531. Reconciliation

Reconciliation is one of the causes of invalidation of punishment. But reconciliation has bearing only on *qisas* and *diyat* to the exclusion of other punishments.

The jurists agree that punishment is invalidated as the result of reconciliation. May be that reconciliation on *qisas* involve *diyat* in full or more or less than that.

The basis of reconciliation is the Prophet's tradition and consensus.

'Amr bin Sho'aib quotes his father and his father quotes with reference to his grandfather that the Holy Prophet (S.A.W.) said, "If a person guilty of intentional homicide is handed over to the heirs of the victim, they have the option to kill him or have their retaliation against him and they will be within their rights to come to terms with him or whatever amount they choose."

During the caliphate of Hazrat Moaviya (R.A.A.) one Hudbah bin Khashram murdered a man. Thereupon Saeed bin 'Aas, Hazrat Hasan (R.A.A.) and Hazrat Husain (R.A.A.) offered seven *diyats* to the son of the victim. But he refused to accept them and killed Hudbah.[2]

As *qisas* does not involve property, compromise thereon is warrantable in whatever form possible, since this constitutes the kind of reconciliation which does not admit of bargaining. This is like effecting a compromise on things. That is why agreement may be concluded on *diyat* more or less in lieu of compromise, which may be realized at once or on a later date.

1. *See Article 253.*
2. *Al Mughni,* Vol. 9, P. 477

If compromise is arrived at on *diyat* and not on qisas, then compromise on more than the prescribed amount of *diyat* is not warrantable, for the amount in excess would be treated as interest. For example the prescribed quantum of *diyat* is a hundred camels and therefore compromise on a hundred twenty camels is unwarrantable for that would constitute excess.

532. Remission

Remission also invalidates the prescribed punishment. Punishment may be remitted by the victim or his lawful heir, or the competent authority. But remission is not the general cause of the invalidation. It rather is a specific cause which is effective in certain cases and ineffective in certain others. A general rule regarding remission is that it has no impact on the *hudood* offences and in case of other offences it has bearing thereon according to the following details:

533. Hudood Offences and Remission

Remission is ineffective in cases involving punishment of hudood, whether remission is granted by the aggrieved party or the competent authority; for in the case of such offence punishment is obligatory and categorical. The jurists interpret it as the right of Allah, and it is wrong to remit or annul His right.[1]

The result of the irremissibility of punishment is that the person subject to a fatal *had* will be treated as a wasted life because of the imperative character of *had*. If his life is subject to imperative *had,* it is worthless and if his limb is subject thereto, that limb is worthless.[2]

534. Remission in Cases of Qisas and Diyat

The *Shariah* allows the aggrieved party to remit the punishments of qisas and *diyat*. But he is not authorized to forgive punishments falling under this category, as for example, he cannot forgive the punishment of expiation and any remission on his part will not prejudice the powers of the competent authority to award a *ta'zeer* punishment.

1. If a *had* punishment is coupled with *ta'zeer*, the competent authority may remit only the *ta'zeer*. If, however, enforcement of a had is replaced by *ta'zeer* the competent authority is not empowered to remit such *ta'zeer*.
2. *Article No.375* and the sequel.

In cases involving *qisas* and *diyat* the competent authority does not have the power to remit the prescribed punishments such as retaliation and expiation, but he may, however, remit a *ta'zeer* punishment. He may remit a punishment in its entirety or a part thereof.

The right of the aggrieved party to forgive is limited just as the power of the competent authority to remit punishment is limited. Neither of them can forgive an offence, that is allow the commitment of an offence. If any of them forgives an offence, the remission will pass on to punishment within the limits already stated. The reason for barring the permission to forgive an offence is that if the aggrieved party is allowed to pardon an offence, then it will not possible to punish an offender at all and this will pose a serious threat to the society. Although an offence has direct impact on the victim yet the community in any case is open thereto. Besides, if the competent authority is empowered to forgive the offence, the right of the victim in cases involving qisas and *diyat* is likely to be lost.

The springs of the competence of the victims or authority to forgive lie in the Quran and Sunnah. Says Allah:

> "O ye who believe! Retaliation is prescribed for you..... And for him who is forgiven somewhat by his (injured) brother, prosecution according to usage and payment unto him in kindness." (2:178)

Again, having been said:.

> "And We prescribe for them therein" ..... it has been added: "But whoso forgoeth *(qisas) (in way of charity), it* shall be expiation for him." (5:45)

As regards *Sunnah,* Hazrat Anas bin Malik narrates that whenever a case of *qisas* was referred to the Prophet (S.A.W.), he enjoined to forgive.

In the opinion of Imam Shafi'ee and Imam Malik, forgoing *qisas* without receiving compensation or having received blood-price amounts to remission of *qisas.* Hence who-ever forgoes *qisas* without any compensation as well as who-ever forgoes it on receiving blood-price, forgives qisas.[1]

1. *Al Muhazzab,* Vol. 2. P. 201; *Al Sharh-al-Kabeer,* Vol. 9, P. 417

According to Imam Malik and Imam Abu Hanifa, *qisas* without compensation stands invalidated and forgoing *qisas* in lieu of blood-money is reconciliation rather than forgiving; since blood-money is due from an offender only when he accepts to pay it.[1]

In short, Imam Malik and Imam Abu Hanifa regard forgoing *of qisas in* lieu of *diyat* as reconciliation and not forgiving, since *qisas* for intentional injury or homicide with them is exact retaliation, inasmuch as in their view *diyat* becomes due only when the offender consents to accept it. Thus if invalidation of *qisas* in lieu of *diyat* requires mutual consent of both the parties involved, it amounts to reconciliation and not remission. Imam Shafi'ee and Imam Ahmed on the other hand treat *diyat* in lieu of *qisas* as remission and not reconciliation, because what falls due in consequence of intentional injury or homicide is either of two things and not exact blood price or exact retaliation. The victim or his lawful guardian's option is not dependant on the consent of the offender. Besides, since retaliation is harder than blood price, the invalidation of retaliation and the option of blood price is invalidation pure and simple and compensatory invalidation. In fact it amounts to the acceptance of a lesser right by forgoing a bigger right, and therefore it amounts to forgiving, for invalidation is effected only unilaterally and is not dependant on the acquiescence of the other patty.

Just as forgiving of *qisas* is warrantable, so also is the forgiving of *diyat,* even if *diyat* be substantive punishment, as for example it falls due in the case of an inadvertent murder or in lieu of *qisas.*

535. Forgiving of Ta'zeer Offences

The consensus of the jurists is that in cases of *ta'zeer* offences the competent authority has the full power of remission. He may forgive the offence as well as punishment thereof, and he may remit the entire punishment or some of it. But the jurists differ on the question if the competent authority is empowered to forgive in all the cases of *ta'zeer* offences or is empowered to forgive in some cases and not in others.

1. *Al Sharh-al-Kabeer,* Vol. 4. P. 230; *Al Zela'ee,* Vol. 6, PP. 107-108; *Al Behral-Raiq,* Vol.8, PP.300-301.

Thus some jurists hold that in the complete cases of *qisas* and *hudood* wherein *qisas* and *had* comes to be inhibited, the competent authority does not enjoy the power of forgiving. In such cases, the *ta'zeer* punishments will be applied. Neither offence will be forgiven nor the punishment thereof. In cases other than these the competent authority may, by rising above personal considerations, forgive both the crime and the punishment in the public interest.[1]

However, some jurists hold that in the case of all the offences involving *ta'zeer,* the competent authority may, at his discretion, forgive both the crime and the punishment.[2] But the opinion of the jurists first mentioned accords with the logic of the *Shariah* as far as offences entailing *hudood* and *qisas* are concerned.

The *ta'zeer* offences such as affect the person of the victim may be forgiven by the victim; as for example beating the victim or abusing him. But forgiving on his part cannot prejudice the community's right to chastize the offender. Hence if the victim forgives him, this act of his would exclusively relate to his personal rights.[3]

On the other hand if the competent authority pardons a crime or punishment thereof in the case of *ta'zeer,* offences, his pardon will not, on any account, have bearing on the rights of the victim.[4]

We have already dwelt at length on remission in the course of our discussion of the refutation of laws repugnant to the *Shariah.*[5]

536. Inheritance of Qisas

If the right to retaliate passes on by inheritance to a person who is not entitled to have retaliation against the offender, the punishment will stand invalidated. Similarly, if the offender himself inherits the whole right of *qisas* or a part thereof, the punishment of *qisas* will stand invalidated; as for example one of the heirs

1. *Sharh Fath al-Qadeer.* Vol. 4, PP. 212-213; *Al Mughni,* Vol. 10. P. 349; Asna-al-Matalib, Vol. 4, pp. 162-163; Al Ahkaam-al-Sultania, p. 207; Al Iqna, Vol. 4, P. 207; *Mawahib-al-Jaleel.* Vol. 6, P. 320.
2. Ibid.
3. *Al Ahkam-al-Sultania.* P. 207;*Mawahib-al-Jaleel.* Vol. 4, P. 163.
4. *Ibid;* also *Mawahib-al-Jaleel.* Vol. 6. P. 320.
5. Please see *Article No.203.*

of the person killed is the son of the killer, the right to retaliate would be annulled, for *qisas* is indivisible. Since qisas is not obligatory because of the killer's son, it will cease to be obligatory in respect of all the heirs. If one of the sons kills his father, and another son who is no killer dies and except the killer there is no heir of the father left; the killer himself inherits the right to take his own life in retaliation. Thus retaliation against him becomes obligatory and as such stands invalidated. Similarly, the right of all the other heirs to retaliate is annulled although they may be inheritors of a part of such right. However, the rest of the deserving persons will have their share in the blood-money.[1]

537. Lapse of Time

Lapse of time means that a certain length of time lapses before the enforcement of sentence resulting in the suspension of the punishment. This is another name for a time-barred criminal case.

The jurists differ on the question of the lapse of time as a cause of invalidation of punishment. Most jurists do not regard it as a cause of invalidation. Those who do acknowledge it as a cause thereof, do not treat it as general cause of invalidation of every punishment. The opinion of the jurists as follows:-

First Theory

The first theory forms the basis of the cults of Imam Malik, Imam Shafi'ee and Imam Ahmed. The sum and substance of this theory is that whatever length of time may elapse, without enforcement of sentence, punishment cannot be nullified and the offence does not cease to be an offence; whatever the delay in the institution of legal proceedings, provided that the punishment is not in the nature of *ta'zeer* and the offence is one involving *ta'zeer,* for if the competent authority considers it in the public interests, both *ta'zeer* and *ta'zeer* punishment may be invalidated by the case being time barred.

The Second Theory

On this doctrine the view of the Hanafite school is based.

1. *Badae'-wal-Sanae',* Vol. 7, P. 281; *Sharh-al-Durdeer,* Vol. 4. P. 233. *Al Mohazzab,* Vol. 2, P. 100; *Al Mughni,* Vol. 9, P.362.

The jurists of this school do acknowledge the concept of the lapse of time in accordance with the first theory in respect of *ta'zeer* punishments but do not believe in such a concept with regard to the offences involving *diyat* and *qazaf*. However, they hold that in the case of all the other *hudood* offences, punishment is annulled by the lapse of time, this is the opinion of Imam Abu Hanifa and his disciples, but according to Imam Jafar a *had* punishment is not annulled by the lapse of time.

Nevertheless, the Hanafites who believe in the invalidation of punishment as the result of the lapse of time differentiate between the establishment of an offence by an eye-witness evidence and confession. If the proof is evidence given by an eye-witness, the prescribed punishment will stand invalidated by the lapse of time but if it is confession, the punishment will not be invalidated.[1]

The basis of this differentiation is that in the case of *hudood* offences the condition laid down by the Hanifites for the acceptance of evidence is that the case is not time-barred, they exempt only the offence of false accusation from this condition, for in the case of *qazaf* or false accusation, reference of a case by the victim is essential and before he refers his case no eye-witness can testify; whereas in cases other than *qazaf* any eye-witness may report the occurrence of an offence and testify. His testification does not depend on the reference of a case by the victim.

In a time-barred criminal case the Hanafites argue that an eye-witness has the option to testify, out of sympathy, immediately without being summoned. Says Allah:

"Keep your testimony upright for Allah." (65:2)

The eye-witness may, however, conceal the incident in conformity to the Prophet's saying:

"Allah will overlook the fault of a person who conceals the fault of his Muslim brother."

Hence, if an eye-witness remains silent over the occurrence of an offence for a long time, it would mean that he prefers to conceal it. But if he testifies after the lapse of a long time, it would mean that his delayed testimony owes itself to malice and the evidence of such a doubtful witness is not acceptable. This

1. According to some jurists the *had* for drinking will be annulled by the lapse of time even if the offence is established by confession.

opinion of Imam Abu Hanifa is corroborated by the observation of Hazrat Umar (R.A.A.) to the effect that the evidence of those who testify after the lapse of time is malafide and as such is unacceptable.

The jurists of the Hanafite school maintain that as other companions of the Holy Prophet (S.A.W.) did not contradict the remark of Hazrat 'Umar (R.A.A.), it amounts to the consensus of the Companions. The meaning of what Hazrat 'Umar (R.A.A.) observed is that the witness by virtue of delay assumes the character of calumniation and the testimony of as slanderer is unacceptable, as the Holy Prophet (S.A.W.) says:- "The testimony of the opposite party and slanderer is not acceptable."

Being a slander, an evidence is rejected and logic requires that if slander ceases to be slander, evidence is not to be rejected as in the case of an eye-witness delaying his evidence because of lengthy procedure or illness. But as slander is something secret and not amenable to investigation in all circumstances, it will turn into a time-barred case and the existence of slander or non-existence thereof will be ignored. As the Hanafites accept lapse of time in the establishment of an offence, they also accept it in the enforcement of punishment, for according to them execution of sentence as a general rule is the supplement of the court's judgement. Hence the conditions required to be fulfilled at the time of judgement will also require to be fulfilled at the time of putting the sentence into effect. Now since it is essential that time should have elapsed at the time of passing the sentence, it should also have elapsed in the time of the execution of the sentence.[1]

Imam Abu Hanifa does not determine the length of time to lapse and leaves it to the discretion of the court; for determination of the length of time is difficult on various grounds.

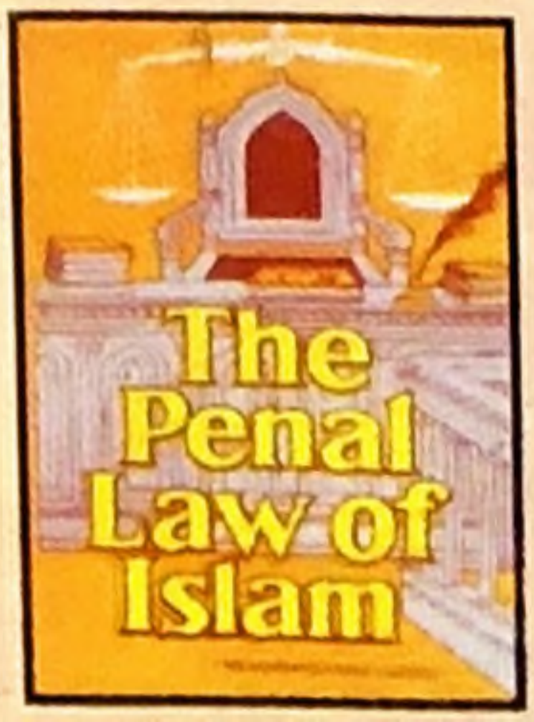
Imam Muhammad, however, fixes six months for expiry of time. Another tradition has it that he fixed one month for the purpose and this period is also ascribed to *Imam Abu Hanifa* and *Imam Abu Yousuf.* In short, the competent authority may fix the

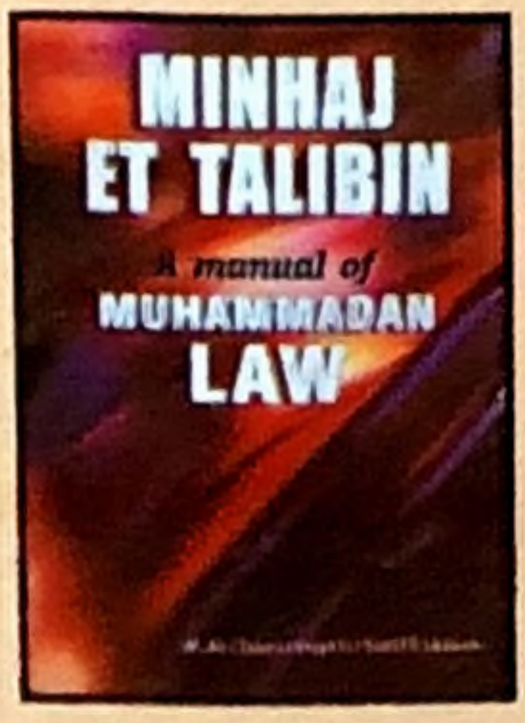
1. *Sharh Fath-al-Qadeer.* Vol.4, P. 161 and the sequel; Hashia Ibn 'Aabideen, Vol. 3, P. 218.

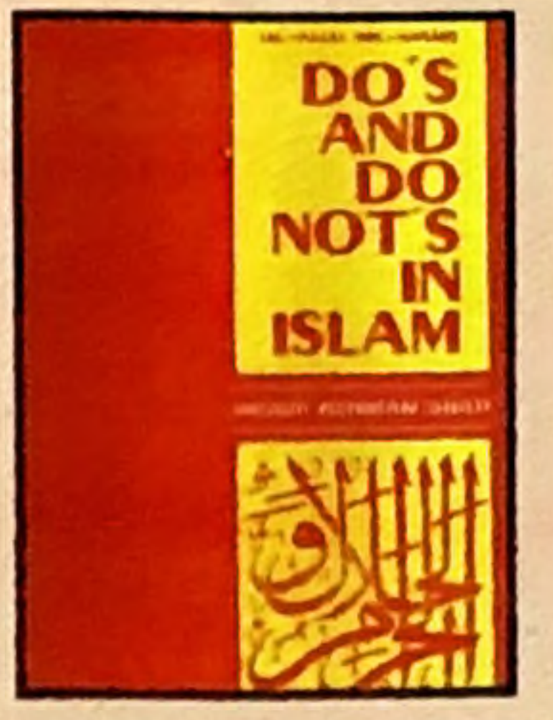
date for a case to be time-barred and may forbid entertainment of the case on the expiry of the date so fixed.

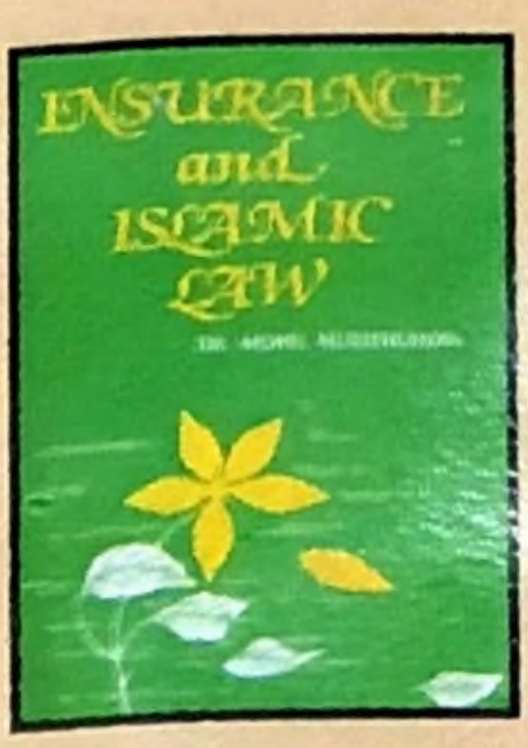
The sum and substance of the Hanafites' view as to the invalidation of *ta'zeer* punishments by virtue of a case being time-barred is that lapse of time invalidates the punishment, whatever the ground of judgement, and if the proof of offence is testimony in cases of *hudood* with the exception of *Qazaf* the punishment stands nullified and if the proof is confession, then according to Imam Abu Hanifa and Imam Yousuf only the *Had* for drinking wine is nullified.[1]

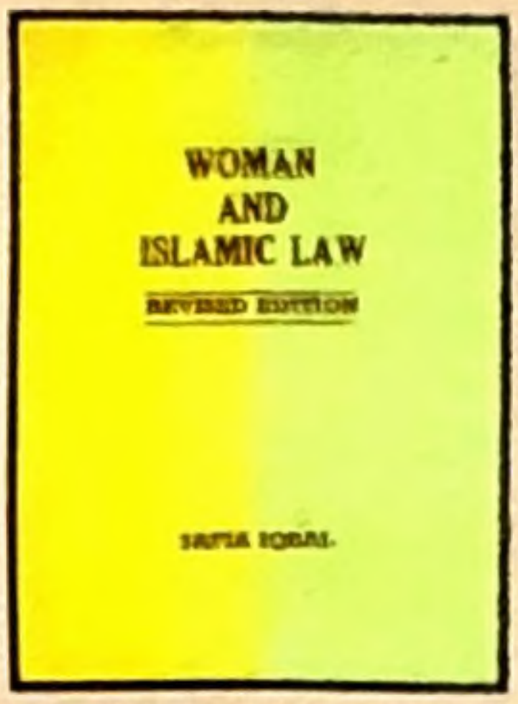
1. *Sharh Fath-ul-Qadeer*, Vol. 4, P. 162.

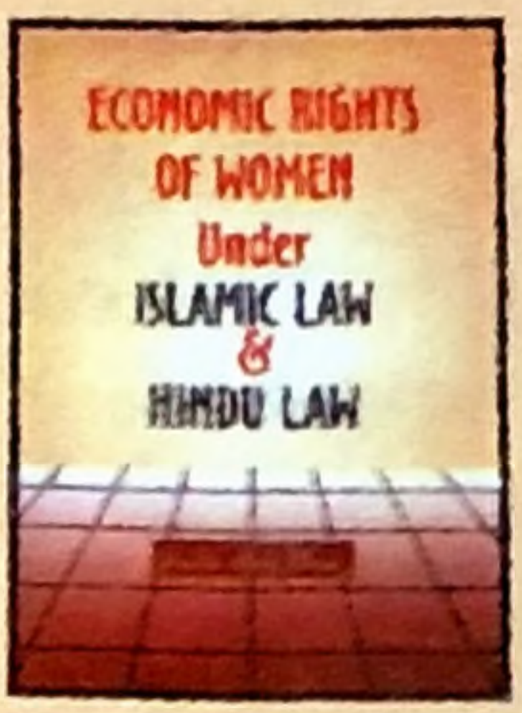


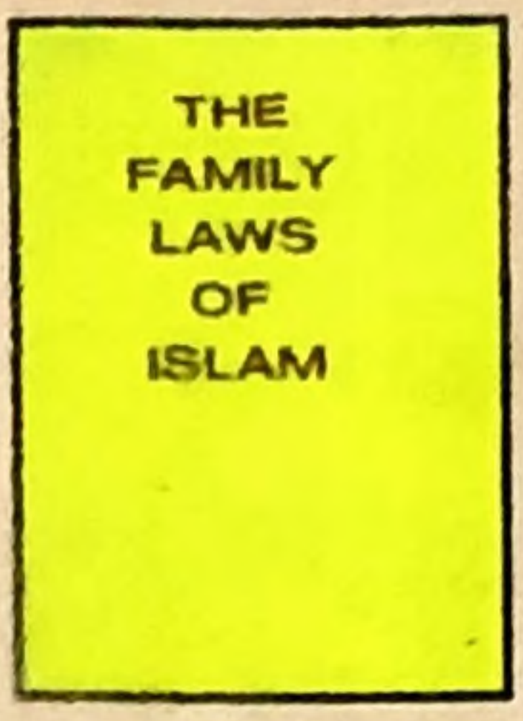


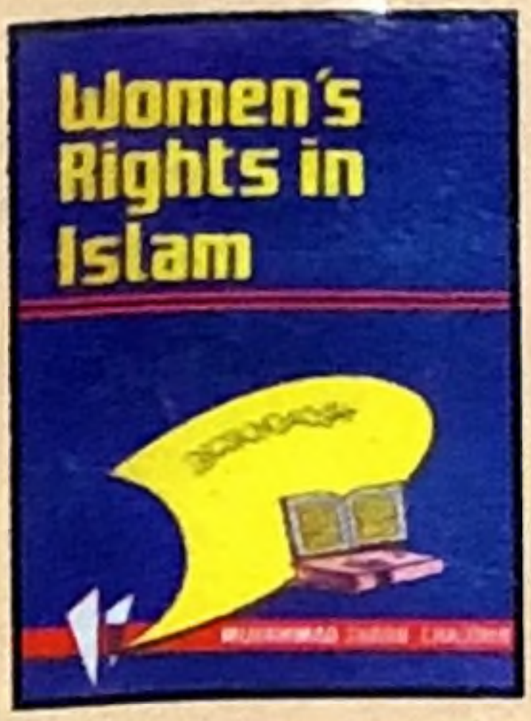


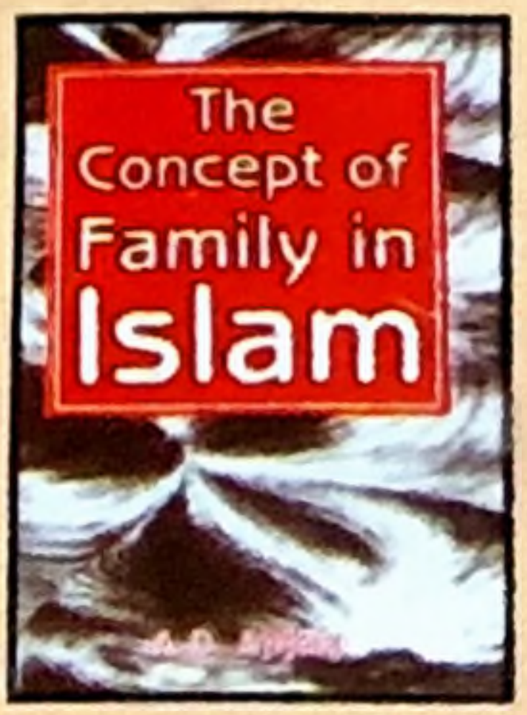


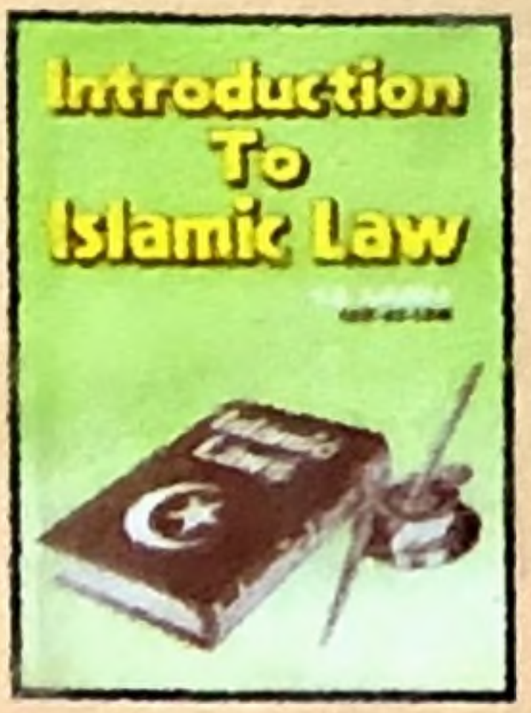


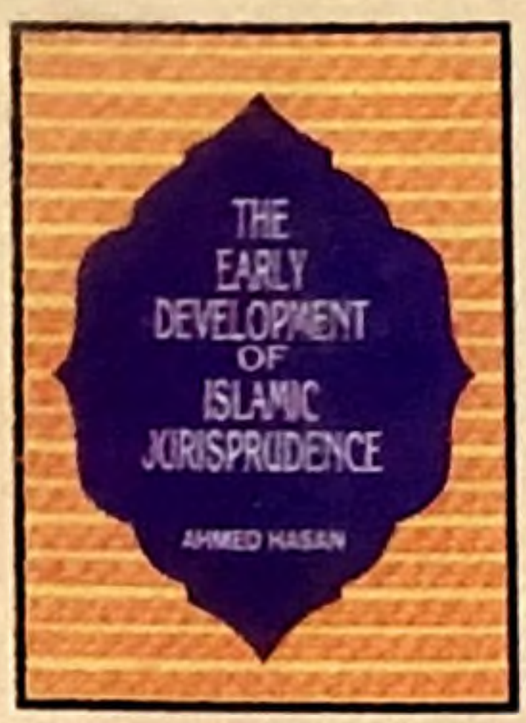


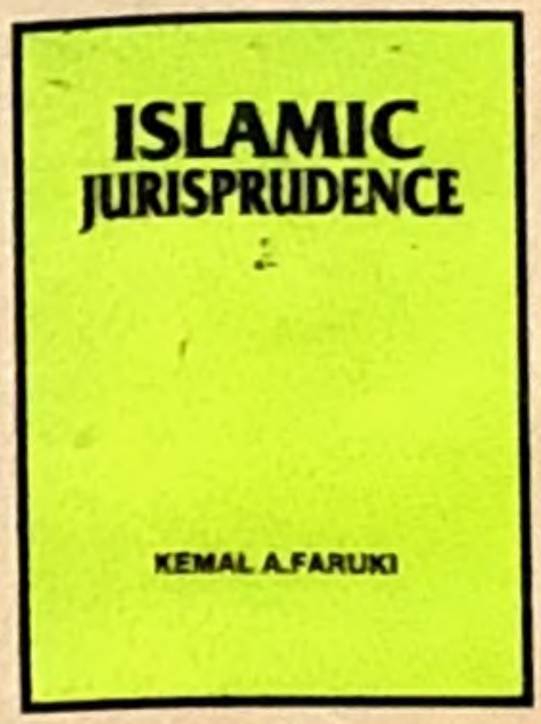


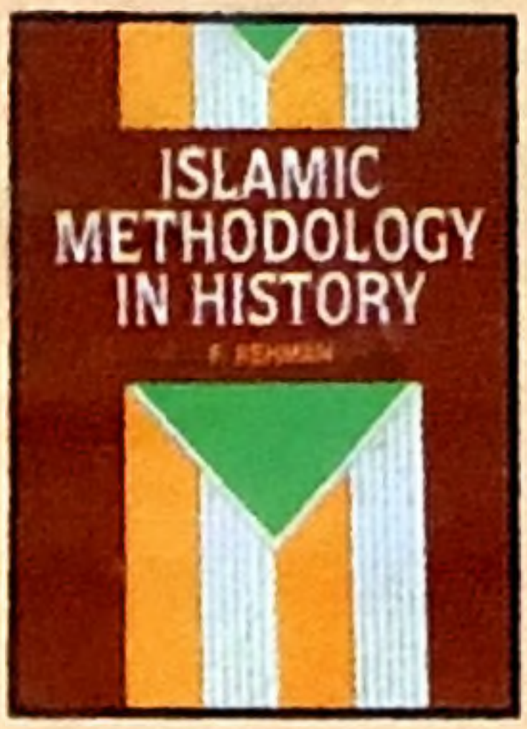


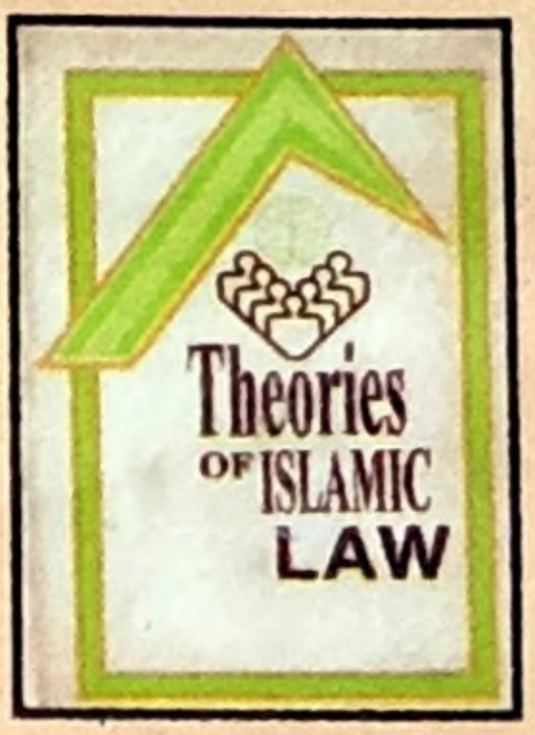


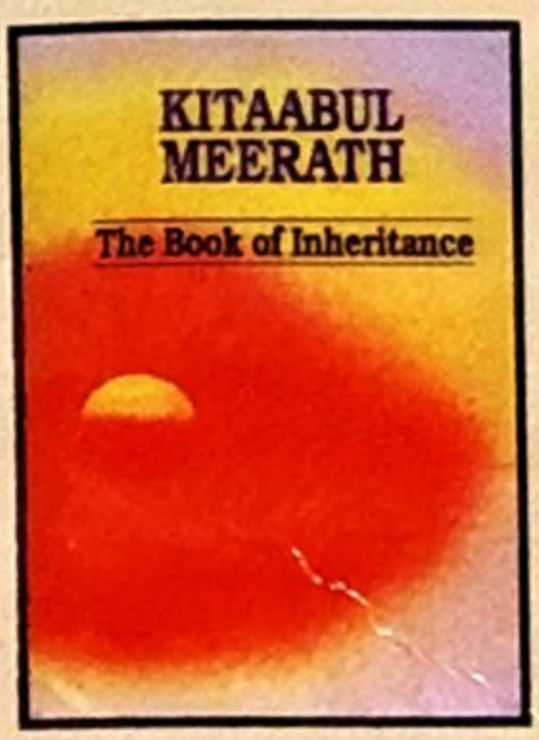












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